

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 Department 19 Hon. Warren L. Ettinger, Judge
4
5 BETTY BULLOCK,)
6 Plaintiff,)
7 vs.) NO. BC249171
8 PHILIP MORRIS, INCORPORATED, a)
corporation; et al.,)
9 Defendants.)
_____)

10

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12 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS
13 Los Angeles, California
14 September 4, 2002
15
16

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8 PLAINTIFF'S VOIR
9 WITNESSES: DIRECT CROSS REDIRECT RECROSS DIRE
Farone, 2316 2435 2464
William A., Ph.D.

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Cummings, 2469
K. Michael, Ph.D.

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2310

1 Los Angeles, California September 4, 2002
2 Case Number: BC249171
3 Case Name: Bullock vs. Philip Morris
4 Department 19 Hon. Warren L. Ettinger, Judge
5 Reporter: Ruanne McArthur, CSR #2699
6 Time: 9:00 a.m. Session
7 Appearances: (As heretofore noted.)
8 -oo-
9

(The following proceedings were held
in open court outside the presence
of the jury:)

THE COURT: Good morning.

(All respond.)

THE COURT: Gentlemen, I don't know if you met Ms. Saka. She is going to be with us this morning.

MR. BLEAKLEY: We did.

THE COURT: We are meeting out of the presence of the jury so that I can deal with the issues involving the attorney-client privilege and the issue of whether or not there has been a waiver due to the -- either crime fraud or the appearance of certain information on the internet.

At this time the court will decline to allow the attorney-client waiver due to --

(Jurors enter courtroom.)

THE COURT: Please keep the jurors out until we're finished.

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You don't need the sign. This is only going to take a few moments.

(Jurors leave courtroom.)

THE COURT: So if there is going to be a claim that there has been a waiver, this court cannot assume merely because the Minnesota court ruled as it did that it's res judicata as to this case and will not do so.

If there is going to be a claim that certain documents should be admitted, then the California procedure must be followed, and we will deal with them on a document-by-document basis when and if a presentation is made to the court.

That's really all I wanted to do this morning is to let you know where that is going to be so that you can govern yourselves accordingly.

It now is a little bit after 9:00. I am going to step out, allow the jurors to come in, put them in the box and get started.

MR. PIUZE: I don't think they are all here.

THE COURT: You are right. Somebody called and said they are going to be a little late.

THE CLERK: Yes. But she might be out there.

THE COURT: Let's check. Who is it, do you

recall?

25 THE CLERK: Juror number 13. Can we allow them
26 in?

27 THE COURT: Yes, they can all come in now.
28 Anything you want to put on the record?

2312

1 MR. LEITER: Nothing on the record, your Honor.

2 MR. PIUZE: Sure. It doesn't have to be at this
3 time.

4 THE COURT: You can put it on now. Don't let
5 any more jurors in.

6 Go right ahead.

7 MR. PIUZE: Okay. My general position is that
8 you can't be a little bit pregnant.

9 THE COURT: I agree with that.

10 MR. PIUZE: And the privilege can't be a little
11 bit gone. It's hard for me to conceive that all of the
12 people in the state of Minnesota have access to these
13 documents which are no longer privileged, but somehow
14 magically an invisible curtain descends upon the state
15 of Minnesota so that these documents cannot get over the
16 state lines, and it's truly, truly hard for me to
17 conceive.

18 Second, the concepts that Philip Morris
19 uses in its papers to try to put the genie back in the
20 bottle, after the genie has been let out of the bottle
21 and after this case has gone all the way to the United
22 States Supreme Court and the Supreme Court says it's out
23 of the bottle aren't really on point; and I think it
24 sort of boils down to two points, but I have to admit I
25 haven't read it in like ten days.

26 But one of them is they say that -- this a
27 quote: "Under California law discovery orders in one
28 case do not have collateral estoppel effect in

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1 subsequent lawsuits."

2 I don't think that's true. The cases they
3 cite do not back that proposition. The cases they cite
4 only -- only state the obvious that a preclusion does
5 not apply to issues that are not necessarily resolved in
6 the prior litigation.

7 Here the crime fraud exception was the
8 issue. It was litigated, it was appealed, and there's
9 no reason to relitigate it.

10 So when they say discovery orders do not
11 have collateral estoppel, I don't think there's any law
12 or case that says that in the way it's being put to the
13 court, although in practical day-to-day application,
14 sure, if Mrs. Smith's dog bites someone, that doesn't
15 necessarily apply when Mrs. Jones' dog bites someone.
16 I'll go with that.

17 Second, there's an issue made that here in
18 California we have an attorney-work product privilege
19 and that's treated differently than in Minnesota.
20 Okay. But who holds that privilege? Is it both the
21 client and the lawyer? Is it just the lawyer? It isn't
22 Arnold & Porter.

23 No one claims it was Arnold & Porter. I'm
24 sure Arnold & Porter doesn't raise their hand and say,
25 "We engaged in the crime of fraud." I bet you a nickel
26 they don't, but we will give them a chance. I bet it
27 was other lawyers; and it's for other lawyers to come up
28 and assert that, which they haven't done.

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1 Last -- and so that applies to all the
2 documents, and that gets me back to the original point.
3 There can't be sort of a maybe waiver or a partial
4 waiver or an instate waiver. It's either waived or it
5 isn't, I think.

6 And then a subset is this: Judge McCoy
7 last year did rule on at least one or maybe more
8 documents here in California. We can easily identify
9 those documents for the court. What is the court's
10 position on those?

11 THE COURT: I have already said that under
12 California, you may raise the issue on a
13 document-by-document basis; and if in California there
14 has been a ruling by a judge in this kind of a case,
15 then obviously, that's quite different than somebody in
16 Minnesota which may or may not have a different set of
17 standards.

18 I would also invite you to furnish the
19 court again -- and you may have already done so. I
20 don't mean to say this critically -- with the United
21 States Supreme Court decision that specifically states
22 that it is the rule of the United States Supreme Court
23 that for all purposes these documents are no longer
24 privileged. Now, obviously, that would have a great
25 significance.

26 So I did not suggest to you by starting
27 early and talking about this that this issue was
28 foreclosed. I simply wanted to tell you that a

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1 different avenue needs to be addressed rather than
2 simply say, "Well, somebody put it on a website; and
3 somebody in Minnesota, which may or may not have
4 different standards than California, has made a ruling
5 and, therefore, California is bound."

6 California is bound if the United States
7 Supreme Court has said we are bound; but otherwise,
8 we're dealing with something that is incredibly
9 sensitive in California, to wit, an attorney-client
10 privilege; and I just need to have more authority and
11 more specificity from the plaintiff that wants to have
12 documents that have been identified as attorney-client
13 privilege and appeared on a privilege log to be
14 admissible; and when and if that happens, we will
15 certainly deal with it again.

16 MR. PIUZE: Thank you.

17 THE COURT: Okay. We can bring the jury in.

18
19 (A recess was taken in the proceedings.)
20

21 (The following proceedings were held
22 in open court within the presence of
23 the jury:)

24
25 THE COURT: Okay. Welcome to one and all. You
26 have to use the telephone. You have to let us know if
27 you are going to be late. We really have to have that,
28 because if it throws us off, we can't have that.

2316

1 So everybody is here. You are still under
2 oath, as I am sure you will remember. It will be
3 helpful, however, since it's a new day and a new
4 transcript, if you will restate your name for the
5 record.

6 THE WITNESS: William Anthony Farone.
7 THE COURT: And would you spell your last name.
8 THE WITNESS: F-a-r-o-n-e.
9 THE COURT: Okay. You may begin your
10 cross-examination.
11 MR. BLEAKLEY: Thank you, your Honor.
12 THE COURT: You're welcome.

13 * WILLIAM A. FARONE, PH.D.,
14 Recalled as a witness by the plaintiff, having been
15 previously sworn, resumed the stand and testified
16 further as follows:
17

18 MR. BLEAKLEY: Good morning.
19 (All respond.)

20 * CROSS-EXAMINATION
21
22 BY MR. BLEAKLEY:

23 Q. Dr. Farone.
24 A. Good morning.
25 Q. In 1984 you were fired by Philip Morris,
26 correct?

2317

1 A. Yes.
2 Q. Mr. Piuze did not ask you yesterday why
3 you were fired, did he?

4 A. No.
5 Q. The fact is, what happened is that you
6 were called into the office of a Mr. Case of human
7 resources and your boss, Max Hauserman, and you were
8 told that you were being fired for insubordination?

9 A. That's what Mr. Case said, not what
10 Dr. Hauserman said, yes.
11 Q. And the insubordination for which you were
12 fired was threatened litigation against Philip Morris
13 and telling your subordinates and employees about that
14 threatened litigation, right?

15 A. Not true.
16 Q. You had told Philip Morris and employees
17 of Philip Morris that you were going to bring a
18 complaint before the EEOC, the Equal Employment
19 Opportunity Commission, right?

20 A. That's not the reason why I was fired.
21 THE COURT: No, no, that's not the question that
22 was asked.

23 MR. BLEAKLEY: Please answer the question I
24 asked.

25 THE COURT: Do you want the question read back?
26 THE WITNESS: No. I understand the question.
27 THE COURT: It's a yes or no question.
28 THE WITNESS: Yes.

2318

1 BY MR. BLEAKLEY:
2 Q. You were told that the reason you were
3 being fired is because you had threatened litigation
4 against the company and that you had told employees of
5 the company, including your own subordinates, of your
6 plans to bring litigation; isn't that right?
7 A. No.
8 Q. That is not what you were told by
9 Mr. Case?
10 A. That's not what I was told.

11 Q. And the threatened litigation was
12 involving the fact that you and your wife had not
13 received promotions that you were expecting and hoping
14 for; isn't that right?

15 A. There was no threatened litigation.

16 Q. You did not leave Philip Morris in 1984
17 out of some sense of disgust, did you?

18 A. That is correct.

19 Q. You were not a disgruntled employee?

20 A. I was not.

21 Q. You did not leave Philip Morris in 1984
22 because all of the things, all of the bad things, that
23 you have been talking about here for the last three days
24 were weighing so heavily on your mind that you couldn't
25 stand it anymore?

26 A. That is correct.

27 Q. In fact, you were planning to stay with
28 Philip Morris; isn't that right?

2319

1 A. Under the right set of circumstances, yes.

2 Q. The right set of circumstances being if
3 you received the promotion that you were hoping for and
4 expecting; isn't that right?

5 A. That's part of it, yes.

6 Q. And you had been told that you weren't
7 going to receive that promotion?

8 A. That's correct.

9 Q. At that time -- that is, was it July of
10 1984? What month in 1984 was it that you were fired?

11 A. The conversation with Mr. Case took place
12 in July. My termination was in September.

13 Q. Okay. In July of 1984 when you were
14 fired, you believed that Philip Morris was still working
15 on technologies that could help to reduce the negative
16 effects of smoking, didn't you?

17 A. Yes, I did.

18 Q. Now, in your testimony last Thursday and
19 here yesterday, you didn't tell the jury very much about
20 the technologies and designs that had been actually
21 implemented into cigarette products, did you?

22 A. I'm not sure. No. Mr. Piuze didn't ask
23 me, no.

24 Q. You didn't come here to tell this jury
25 about the good things that Philip Morris had done in an
effort to develop safer cigarettes, did you?

27 A. I did mention that we'd eliminated all of
28 the carcinogens in the Cambridge cigarette, which is

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1 about as good as it gets.

2 Q. Yes. But you were very critical of Philip
3 Morris with respect to the Cambridge cigarette, weren't
4 you?

5 A. Well, yes, because the tar was
6 subsequently increased.

7 Q. Okay. Now, let's go back to the question
I asked you, which was: You didn't come here to tell
this jury about the things that Philip Morris had done,
that it had accomplished, that it had incorporated into
cigarette products that you believed and others believed
would actually make the product safer, did you?

13 A. No, I did not.

14 Q. And all of these things that Philip Morris
15 did were done with the goal in mind of making a safer

16 or, if possible, a safe cigarette, weren't they?
17 A. Yes, they were.
18 Q. All of the things that were done by Philip
19 Morris before you got there and while you got there were
20 done with the goal in mind of reducing or eliminating
21 those carcinogenic chemicals from cigarette smoke; isn't
22 that right?

23 A. No.
24 Q. You didn't mean to suggest to the jury
25 yesterday, did you, that reducing or eliminating
26 carcinogenic chemicals from cigarettes is something you
27 figured out all by yourself?
28 A. I did not.

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1 Q. The fact of the matter is, you know
2 perfectly well that the foundation of what Philip Morris
3 and other tobacco companies and public health
4 authorities were doing and had been talking about for
5 many, many years before you got there was reducing or
6 eliminating carcinogens; isn't that right?

7 A. That is correct.

8 Q. That's what Dr. Ernst Wynder was
9 suggesting when he urged the tobacco companies to reduce
10 the tar levels of cigarettes, isn't it?

11 A. Yes.

12 Q. And Dr. Ernst Wynder was one of those
13 scientists who had done the mouse skin painting and
14 epidemiological studies back in the 1950s that showed an
15 association between smoking and cancer, isn't he?

16 A. He was one of the first, yes.

17 Q. And Dr. Wynder urged the tobacco industry
18 to try to reduce the danger of the carcinogenic
19 chemicals in cigarettes by reducing the amount of tar,
20 right?

21 A. He did.

22 Q. And that's what Helmut Wakeham, the
23 director of research and development, was talking about
24 in that memorandum that you discussed with the jury
25 yesterday or last Thursday, wasn't it?

26 A. Yes.

27 Q. You didn't mention that, though, did you?

28 A. I wasn't asked.

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1 Q. No, you weren't. In fact, what Mr. Piuze
2 asked you was: "Does this exhibit identify four, in the
3 New York offices, cancer promoting agents in Philip
4 Morris tobacco smoke."

5 That was the question he asked you, didn't
6 he?

7 A. Yes.

8 Q. And you said yes.

9 A. Yes.

10 Q. But you said nothing else about what was
11 in that document, did you?

12 A. I wasn't asked. Yes, that's correct.

13 Q. Let's take a look at this document.

14 THE COURT: Counsel, it would be helpful if when
15 you find it, you give us the number of it.

16 MR. BLEAKLEY: I am going to do that. It's
17 Plaintiff's Exhibit 35, a memorandum or a presentation
18 dated November 15, 1961, entitled: "Tobacco and Health
19 R&D Approach Presentation to R&D Committee by Dr. H.
20 Wakeham at meeting held in New York office."

21 I believe this has already been received
22 in evidence.

23 THE COURT: I believe you are right, yes.

24 BY MR. BLEAKLEY:

25 Q. This document actually sets forth
26 Dr. Helmut Wakeham's proposals, his recommendations, for
27 trying to develop a safe cigarette; isn't that right?

28 A. Among other things, that's correct.

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1 Q. But you didn't mention that yesterday?

2 A. I did not.

3 MR. PIUZE: Excuse me, your Honor. I want to
4 object to this. Yesterday, whenever there was more than
5 a yes or no, it was motion to strike, and now he's
6 criticizing for not volunteering things.

7 THE COURT: No, no. Counsel, we do not have
8 speaking objections.

9 MR. PIUZE: Okay. I object that it's
10 argumentative.

11 THE COURT: Sustained.

12 BY MR. BLEAKLEY:

13 Q. In this document, Dr. Wakeham talks about
14 a partial list of compounds in cigarette smoke that had
15 been identified as carcinogens, right?

16 A. Correct.

17 Q. And in 1961 that information was publicly
18 available information, wasn't it?

19 A. Well, I'd have to look at the list, but a
20 lot of it was publicly available, yes.

21 Q. In fact, in 1963 in connection with the
22 Surgeon General's work dealing with the report that came
23 out in 1964, Philip Morris submitted a list of those
24 carcinogens to the Surgeon General's committee, didn't
25 it?

26 A. Yes.

27 Q. This document talks about cancer promoting
28 agents in cigarette smoke, but it was quoting from a

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1 published article from the British Journal of Cancer in
2 1959, wasn't it?

3 A. I believe that's correct.

4 Q. That was available in the scientific
5 literature, right?

6 A. That is correct.

7 Q. This wasn't some secret that Dr. Wakeham
8 held close to his chest, is it?

9 A. No.

10 Q. Dr. Wakeham also said in this document,
11 "Present knowledge and current research indicate three
12 main approaches," back in 1961, didn't he?

13 A. That's correct.

14 Q. One of them -- the three approaches, were:
15 One, reduction of irritating factors in smoke; two,
16 controlled nicotine in filler and smoke; and three,
17 reduction of the general level of carcinogenic
18 substances in smoke but without complete elimination of
19 more than a few specific compounds, right?

20 A. I don't know. You have the document. I
21 don't have it in front of me and that's a lot to
22 remember; but I agree with you in principle.

23 Q. And these were reasonable recommendations
24 and proposals for Dr. Wakeham to be making back in 1961,
25 weren't they?

26 A. Yes.
27 Q. Now, later in the document, Dr. Wakeham
28 talks about several possible ways to reduce carcinogens

2325

1 in tobacco smoke, didn't he?

2 A. Yes, he did.

3 Q. And that was a good thing for him to be
4 talking about those things, wasn't it?

5 A. Absolutely.

6 Q. And at the last page there's a summary,
7 and in that summary Dr. Wakeham says: "A medically
8 accepted low carcinogen cigarette may be possible. It's
9 development would require time, money, and unfaltering
10 determination." Isn't that right?

11 A. That is absolutely correct.

12 Q. And when you came to work for Philip
13 Morris in 1976, Philip Morris had been doing that for
14 about 15 years, hadn't it?

15 A. Philip Morris had been working on it for
16 15 years, that's correct.

17 Q. Philip Morris has been trying to eliminate
18 or reduce carcinogens in cigarette smoke for a long
19 time, hasn't it?

20 A. Yes.

21 Q. It's been trying hard, hasn't it?

22 A. It achieved elimination in 1980.

23 Q. And the answer to my question --

24 A. Yes.

25 Q. -- it had been trying hard is yes?

26 A. Yes.

27 Q. It's still trying today, isn't it, to the
28 best of your knowledge?

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1 A. No. There's -- some of the changes they
2 made in cigarettes recently that I have become aware of
3 in 2000 -- we are sort of backtracking a little bit --
4 but I will agree with you that over the years Philip
5 Morris has tried to reduce tar levels.

6 Q. Let's make sure we understand exactly what
7 you are saying. Are you telling the jury that Philip
8 Morris is, not today, in 2002, trying hard to eliminate
9 or reduce carcinogens in tobacco smoke? Is that your
10 testimony?

11 A. They are trying. The "hard" is the part I
12 am having trouble with. They are certainly trying to do
13 it, but because they have actually increased tar levels
14 in some cigarettes which were lower, I'm questioning the
15 word "hard."

16 Q. Now, one of the things that Philip Morris
17 started trying to do way back in the 1960s was what is
18 often referred to as "selective reduction" of tar in
19 cigarettes; isn't that right?

20 A. That's correct.

21 Q. Philip Morris and the other tobacco
22 companies and scientists all over the world tried to
23 eliminate particular chemicals from cigarettes that were
24 suspected of being carcinogenic, right?

25 A. That's correct.

26 Q. One that we have heard about during this
27 trial and some of the jurors may know about is one
28 called benzo-pyrene, right?

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1 A. That's correct.

2 Q. Back in the 1960s, benzo-pyrene was
3 thought perhaps to be one of the chemicals or compounds
4 that might contribute to cancer, right?
5 A. Well, I would go further than that, but I
6 can accept it. I think it was fairly well determined by
7 1964, but. . .

8 Q. So the answer to my question is yes?

9 A. No, no. The "thought perhaps" is what I
10 was having trouble with. It wasn't thought perhaps. By
11 the time I got there, it was very well-known that was a
12 cause of cancer.

13 Q. But I was talking about the 1960s.

14 A. I said by '64. I became aware of it in
15 1959, so I mean. . .

16 Q. Okay. Let's assume for the moment that
17 everybody in the world knew benzo-pyrene caused lung
18 cancer in 1961. The fact of the matter is, Philip
19 Morris and all of the other tobacco companies and
20 scientists all over the world tried very hard to remove
21 benzo-pyrene from tobacco smoke, didn't they?

22 A. Again, they tried. I will go that far.

23 Q. But not very hard?

24 A. It's easy to remove.

25 Q. And did they remove it?

26 A. No.

27 Q. Did they eliminate it?

28 A. No. They could have, they didn't.

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1 Q. Did they reduce it?

2 A. Yes.

3 Q. Okay. Your testimony is that Philip
4 Morris didn't try hard enough to remove benzo-pyrene?

5 A. That's correct.

6 Q. And for that you are very critical of
7 Philip Morris?

8 A. Yes.

9 Q. Now, they also tried to remove other
10 suspected carcinogenic chemicals from tobacco smoke,
11 didn't they?

12 A. That's correct.

13 Q. Long before you got there?

14 A. That's correct also.

15 Q. Some of them Philip Morris was able to
16 remove and some of them it wasn't able to remove; isn't
17 that right?

18 A. I don't know which ones you are referring
19 to. I can't think of any that it was able to remove to
20 levels that were accepted as being reasonable levels
21 except for, again, the Cambridge example that we talked
22 about yesterday.

23 Q. What about a 90 percent reduction in a
24 carcinogenic compound, would that be reasonable?

25 A. No. You need -- even with a nanogram, you
26 have quadrillions of molecules. You can't talk about
27 90 percent. We have to talk about orders of magnitude,
28 getting it down to very tiny amounts.

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1 Q. So the adoption of a program that permits
2 the reduction of 90 percent of a carcinogenic compound
3 is totally wasted and useless in your view?

4 A. No. I've testified before it's a step in
5 the right direction, but it is known and was known at
6 the time that that was not sufficient to making a

7 meaningful reduction in the carcinogen.
8 Q. And is it your testimony to this jury here
9 today that Philip Morris deliberately refused to take
10 that extra step?
11 A. Yes.
12 Q. Now, Philip Morris also engaged in efforts
13 to do what has been referred to as "general reduction"
14 in its research of tar, right?
15 A. That is correct.
16 Q. By reducing the overall tar level without
17 regard to specific compounds within the tar?
18 A. That's correct.
19 Q. And it started doing that long before you
20 got there, didn't it?
21 A. It did.
22 Q. And that was something that was being
23 recommended and urged upon Philip Morris and the other
24 tobacco companies by public health authorities
25 throughout the world?
26 A. That is correct.
27 Q. In fact, when you joined Philip Morris in
28 1976, you believed, based on your own investigation,

1 that Philip Morris had already taken significant steps
2 toward the development of a safe cigarette, didn't you?
3 A. I did.
4 Q. You were very impressed with the research
5 and development effort that was going on at Philip
6 Morris?
7 A. I was.
8 Q. You thought it was a good thing Philip
9 Morris was doing?
10 A. Yes. That's why I joined them.
11 Q. Philip Morris was already using, before
12 you got there, expanded tobacco?
13 A. That is correct.
14 Q. They were already using reconstituted
15 tobacco?
16 A. That is correct.
17 Q. They were already using porous cigarette
18 paper?
19 A. Yes.
20 Q. And filter ventilation?
21 A. Yes.
22 Q. You talked about charcoal filters. Philip
23 Morris already had a charcoal-filtered cigarette on the
24 market, didn't they?
25 A. One of its products, yes, sir.
26 Q. Cigarettes with charcoal filters have been
27 on the market in the United States since the 1950s,
28 haven't they?

1 A. Yes.
2 Q. And Philip Morris had a charcoal-filtered
3 cigarette that went back to the 1960s, didn't it?
4 A. At least. Maybe the late Fifties, also.
5 Q. A multifilter?
6 A. A multifilter, yes.
7 Q. When you arrived, Philip Morris was
8 working with a group called The Tobacco Working Group,
9 wasn't it?
10 A. Yes, they were.
11 Q. The Tobacco Working Group was a joint

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12 group of scientists, government, public, from tobacco
13 companies who were working together to try to develop a
14 safer cigarette, weren't they?

15 A. Yes, in principle.

16 Q. The Tobacco Working Group was affiliated
17 with the National Cancer Institute, wasn't it?

18 A. It was.

19 Q. And The Tobacco Working Group had been
20 going on and doing its work for a number of years before
21 you got there?

22 A. I think three or four years, yes.

23 Q. You talked a lot about nitrosamines.

24 Nitrosamines are among the compounds that are believed
25 to be cancer causing in cigarette smoke, right?

26 A. They are cancer causing in cigarette
27 smoke; not believed to be, but yes.

28 Q. They are also believed to be, aren't they?

2332

1 A. Well, I guess.

2 Q. Aren't you quibbling?

3 A. No, no. Belief isn't a part of -- you
4 know, you can't believe in things in science. You
5 either prove it or you don't.

6 Q. When you arrived at Philip Morris in 1976,
7 the company already had in place a program to remove
8 nitrates from the cigarette smoke, didn't they?

9 A. They did.

10 Q. Called crystallization?

11 A. Well, it's not from cigarette smoke. It's
12 from one fraction of the tobacco known as reconstituted
13 tobacco, which you mentioned. It only removed it from
14 that fraction.

15 Q. Called crystallization?

16 A. Yes.

17 Q. The purpose of removing nitrates was to
18 help prevent the development of nitrosamines, correct?

19 A. That is correct.

20 Q. And to help prevent the development of
21 another potentially bad substance called oxides of
22 nitrogen?

23 A. That is correct.

24 Q. That was a good thing it was doing, wasn't
25 it?

26 A. Yes.

27 Q. And you had nothing to do with it? You
28 had nothing to do with it?

2333

1 A. No, that's not true.

2 Q. This was all going on before you got there?

3 A. Well, it was going on, but our people were
4 involved in that process too, doing a lot of the
5 background chemistry for it. So it wasn't completed.
6 That process was made more efficient during the time I
7 was there.

8 Q. You talked about -- I'm sorry. What was
9 your last answer? I missed that.

10 A. The process was made more efficient during
11 the time that I was there.

12 Q. I understand. But they had already
13 developed the process that was capable of removing
14 90 percent, right?

15 A. 90 percent of the nitrates in that one
16 fraction of tobacco, which represented about 10 to

17 15 percent of the total filler. So it's not 90 percent
18 throughout the entire tobacco.

19 Q. Fair enough. But that was a good thing,
20 wasn't it?

21 A. Absolutely.

22 Q. Philip Morris already also had a program
23 that involved a cobalt aluminum filter, didn't it,
24 before you got there?

25 A. Cobalt on aluminum, yes.

26 Q. And that was a project that was an effort
27 to reduce the amount of carbon monoxide in smoke, wasn't
28 it.

2334

1 A. It reduced the carbon monoxide by 99-plus
2 percent.

3 Q. And that was already in place when you got
4 there, wasn't it?

5 A. Well, they had the technology. The
6 catalyst itself was poisoned by water, so we had to
7 figure out a way to make it useful without having the
8 water hit the catalyst. So it was in place, but we
9 added to it.

10 Q. I didn't suggest that your organization
11 didn't add to it. Your organization did add to it and
12 continued to work on the project, didn't it?

13 A. Yes, it did.

14 Q. You talked about nicotine analogs. The
15 nicotine analog program was an effort to try to find
16 something that was like nicotine but wouldn't have
17 potential negative effects on the cardiovascular system,
18 right?

19 A. That is correct.

20 Q. That was another good program that Philip
21 Morris had going, wasn't it?

22 A. Excellent program.

23 Q. Philip Morris was also working before you
24 got there -- let me start over again.

25 Yesterday you talked about how it would be
26 a good thing if you could figure out how to heat tobacco
27 instead of burn it, right?

28 A. That is correct.

2335

1 Q. And Philip Morris had in place long before
2 you got there, a program in which it was trying to
3 develop a cigarette that would heat rather than burn
4 tobacco, wasn't it?

5 A. Yes, it was.

6 Q. And that research continued all through
7 the time that you were at Philip Morris?

8 A. It did.

9 Q. And it continued after you left Philip
10 Morris?

11 A. Yes, for about 40 years.

12 Q. And it ultimately resulted in a product
13 that is out in the test market today, didn't it?

14 A. It's still in the test market.

15 Q. The Accord?

16 A. Yes.

17 Q. But you know about the Accord?

18 A. I know about the Accord.

19 Q. It's still in test market?

20 A. I didn't know if it was in the test market
21 or the market yet.

22 Q. But you knew that it was -- at some point
23 it was actually brought out in test market?
24 A. Yes, I did.
25 Q. Resulted in a potentially commercial
26 product, right?
27 A. Well, that's -- yes, potentially
28 commercial.

2336

1 Q. Only time will tell whether or not it will
2 be a successful commercial product, right?
3 A. No, I don't agree with that.
4 Q. You don't agree with that?
5 A. Well, it's been in test market for four
6 years.
7 Q. I thought you said you didn't know whether
8 it was still in test market?
9 A. I didn't know whether they offered it
10 commercially. You had indicated it hadn't been --
11 Q. I see your point. Okay.
12 A. I'm not sure it's been offered
13 commercially.
14 Q. I meant -- I misspoke.
15 It's been developed into a potentially
16 commercial product?
17 A. That's true.
18 Q. Okay. And that was a good thing, wasn't
19 it?
20 A. Yes.
21 Q. Now, let's go back and talk for just a
22 moment about when you first came to Philip Morris. You
23 spent the first year you were there getting acquainted
24 with Philip Morris' technology and the operations,
25 right?
26 A. That's correct.
27 Q. You visited the company's manufacturing
28 plants?

2337

1 A. Yes.
2 Q. You visited the R&D department?
3 A. Well, I was there, yes.
4 Q. Spent a lot of time in the company's
5 library?
6 A. I did.
7 Q. You read a lot of external documents and a
8 lot of internal documents?
9 A. That's correct.
10 Q. You found many internal Philip Morris
11 documents going way back to the 1930s?
12 A. I did.
13 Q. You did the best investigation you could
14 to find out what Philip Morris was doing?
15 A. That was my job, yes.
16 Q. You found that there were a lot of decent,
17 hardworking, dedicated people at Philip Morris, right?
18 A. I did.
19 Q. Trying their best to develop a safer,
20 safer cigarette?
21 A. A lot of them were, yes.
22 Q. Some of them weren't, I suspect, is what
23 you are suggesting?
24 A. Well, it wasn't the job function of
25 everyone to develop a safer cigarette. There were other
26 job functions including, for example, maintaining the

27 controversy about whether it was causative or not.

28 But a lot of people, I will agree with

2338

1 you, were working on developing a safer cigarette, about
2 80 percent, I estimated before, of the people working
3 for me.

4 Q. And after you spent that first year
5 learning about Philip Morris and its operations, you
6 made a decision to stay and work at Philip Morris,
7 didn't you?

8 A. I did.

9 Q. Now, back when you became the director of
10 applied research, which I think you said was 1977?

11 A. I think early '77. I believe that's
12 correct.

13 Q. About a year after you got there?

14 A. Yes.

15 Q. There were about 40 people in your
16 department, weren't there?

17 A. That's correct.

18 Q. By the time you left in 1984, there were
19 between 2- -- there were about 250 people in your
20 department?

21 A. That's correct.

22 Q. And you know that it's even larger today?

23 A. Well, I'm not sure what you mean by "it."

24 Q. The number of people, including research
25 scientists, working on the development of safe
26 cigarettes is even larger today, isn't it?

27 A. Yes.

28 Q. You spent about 80 percent of your time at

2339

1 Philip Morris trying to develop a safer cigarette?

2 A. That is correct.

3 Q. And there were a lot of people in your
4 department, in your directorate, who were spending
5 100 percent of their time on it, weren't there?

6 A. Yes.

7 Q. And there were other people in other parts
8 of the research and development department who were
9 spending significant amounts of time trying to develop
10 safer cigarettes, weren't there?

11 A. Yes.

12 Q. Trying to reduce the risks of smoking?

13 A. That's correct.

14 Q. And you thought that was a worthwhile
15 objective?

16 A. I did. Still do.

17 Q. You've testified that you were proud of
18 the work that you and your colleagues did at Philip
19 Morris to try to develop safer cigarettes?

20 A. The work, scientific work, was excellent.

21 Q. When you left Philip Morris in 1984, you
22 believed that the work that had been done in your
23 department by you and your colleagues had actually
24 influenced the entire tobacco industry to try to make
25 safer products, didn't you?

26 A. I did.

27 Q. But you didn't talk about any of that
28 during your testimony on direct examination Thursday or

2340

1 yesterday?

2 THE COURT: That is argumentative. I have

3 already ruled on it.

4 MR. BLEAKLEY: Sorry, your Honor.

5 THE COURT: That's all right.

6 BY MR. BLEAKLEY:

7 Q. By the way, when you testified on Thursday
8 and yesterday, you didn't show the jury or discuss with
9 the jury a single document that was written by you, did
10 you?

11 A. I didn't select the documents. So you are
12 right, I didn't.

13 Q. Nor did you discuss with the jury any
14 documents that were sent to you?

15 A. As the main recipient, no, that's correct.

16 Q. And you didn't show the jury any
17 documents, any memoranda from you complaining about the
18 research that Philip Morris was doing, did you?

19 A. I'm not sure of the question. I didn't
20 show the jury anything. Mr. Piuze showed the jury. I
21 mean, there are such documents.

22 Q. There are such documents with you as the
23 author complaining about the research that was being
24 done?

25 A. At least two that I can think of.

26 Q. But you didn't show any of them to the
27 jury, did you?

28 A. No. We could have, but it's not my

2341

1 selection.

2 THE COURT: Counsel, we are not going to keep
3 dancing this dance. The witness doesn't show documents
4 to the jury. The lawyer shows documents to the jury and
5 asks the witness questions. That's the way we do it.
6 That's the way everybody does it.

7 Let's move on.

8 BY MR. BLEAKLEY:

9 Q. Now, these documents that you did show the
10 jury, which you discussed with the jury, I can't
11 remember whether you said it with respect to every one
12 of them, but with respect to several of those documents,
13 Mr. Piuze asked you if you had seen the documents before
14 and you said yes.

15 Do you remember that?

16 A. Yes.

17 Q. Many of those documents you had seen
18 before only in connection with litigation; isn't that
19 right?

20 A. Some of them. Some of them I saw while I
21 was there.

22 Q. But several of them are documents that you
23 never saw before until they were produced in litigation
24 and shown to you as a part of your testimony or
25 preparation for your testimony?

26 A. That's probably correct, yes.

27 Q. You said that Dr. Osdene told you that his
28 job, his real job, was to maintain the controversy. He

2342

1 had lots of other jobs too, didn't he?

2 A. Well, yes. They changed over time, but
3 that was his main job.

4 Q. He told you that was his main job, or is
5 it your testimony that that was his main job?

6 A. Not only did he tell me that, our mutual
7 boss told me the same thing, both Dr. Seligman and

8 Dr. Osdene; and he had a whole department of people that
9 were helping him do that, and I can name them if you
10 wish.

11 Q. That won't be necessary.

12 A. Okay.

13 Q. What you can tell us is you can identify
14 all the people who were doing biological research in the
15 department run by Dr. Osdene?

16 A. It's a different set of people.

17 Q. They worked for him, though, didn't they?

18 A. Yes.

19 Q. He was responsible for biological
20 research, wasn't he?

21 A. That is correct.

22 Q. How many people in his department were
23 involved in biological research?

24 A. Approximately 30 people.

25 Q. He was also responsible for behavioral
26 research, wasn't he?

27 A. Yes, he was.

28 Q. The research on nicotine analogs, that

2343

1 fell under Dr. Osdene's wing, didn't it?

2 A. That is correct. Excuse me. The rat
3 studies fell under his wings. The synthesis of the
4 chemicals later fell under my jurisdiction.

5 Q. But before it fell under your
6 jurisdiction, it was under his, wasn't it?

7 A. That is correct.

8 Q. Dr. Osdene did lots of things other than
9 maintaining the controversy, didn't he?

10 A. That is correct.

11 Q. He had a very important and responsible
12 job in R&D, didn't he?

13 A. He did.

14 Q. Including in the attempts to develop safe
15 or safer cigarettes?

16 A. Yes. He was involved in that program
17 also.

18 Q. Now, let's go back for a moment to your
19 firing by Philip Morris in July of 1984.

20 You told us yesterday that you are not
21 here for any revenge, right?

22 A. That's correct.

23 Q. Until you were fired in July of 1984, you
24 pretty much saw your future at Philip Morris, didn't
25 you?

26 A. Yes. I had sent out, as I said before,
27 some resumes to other places at various times, but I
28 didn't act on any of them.

2344

1 Q. Back in December of 1983, it had been
2 announced to Philip Morris R&D people that you were
3 going to be promoted to the job of vice-president of
4 R&D, right?

5 A. That is correct.

6 Q. The person who was the head of R&D at
7 Philip Morris was Dr. Max Hauserman at that point,
8 right?

9 A. That is correct. He was instructed to
10 make that announcement.

11 Q. He was your boss. He was from Switzerland
12 and he was going back to Switzerland?

13 A. That is correct.
14 Q. And it had been announced that you were
15 going to take his place?
16 A. He announced it, yes.
17 Q. And you were pleased about that, weren't
18 you?
19 A. Not -- no. I thought it was kind of
20 unusual to announce it without doing it because the time
21 was not mentioned. Sometime in the future this is going
22 to happen.
23 Q. You have previously testified that you
24 were happy when you learned that you were going to be
25 promoted?
26 A. I wasn't unhappy. I didn't say that. I
27 was just pointing out that I was questioning -- I
28 questioned Dr. Hauserman at the time and I have

2345

1 testified about this -- concerning why you would make an
2 announcement six months in advance of some event.
3 That's not a usual thing to do.

4 Q. You were happy?
5 A. I was not happy.
6 Q. You were going to become the number one
7 person in R&D for Philip Morris?
8 A. Yes. And I would be Dr. Osdene's boss in
9 that capacity.
10 Q. This would be a major promotion and a step
11 up for you, right?
12 A. It would, yes.
13 Q. You would be in charge of some 600 people?
14 A. That's correct.
15 Q. You would have five divisions instead of
16 just one, right?
17 A. Directorates, yes.
18 Q. Directorates.
19 You expected this promotion to happen,
20 didn't you?
21 A. Yes. They had said it was going to
22 happen.
23 Q. And you were going to accept it, weren't
24 you?
25 A. Yes.
26 Q. Nothing that had happened during the
27 previous years that you had been at Philip Morris, none
28 of the things that you had talked about here last

2346

1 Thursday and yesterday were going to prevent you from
2 accepting that job, were they?
3 A. None of those things were going to -- no,
4 they wouldn't prevent me from influencing the company in
5 a higher-level job, no. That was the whole idea.
6 Q. Now, your wife was also working at Philip
7 Morris at the time, wasn't she?
8 A. She had been for 19 years.
9 Q. And she was expecting a promotion too,
10 right?
11 A. As a matter of fact, she was told she was
12 going to obtain a promotion, yes.
13 Q. And then she learned that she wasn't going
14 to get that promotion?
15 A. Yes. And she learned the reason why she
16 wasn't going to get the promotion.
17 Q. And as a matter of fact, she believed and

18 you believed that she was being discriminated against
19 because she was a woman?

20 A. That's what she was told. She was not
21 going to get the promotion because she was a woman.

22 Q. And as a result, she filed a complaint
23 with the Equal Employment Opportunity Commission
24 charging Philip Morris with discrimination?

25 A. Yes. Because there was an ongoing consent
26 decree that Philip Morris had --

27 MR. BLEAKLEY: Objection, your Honor. He has
28 answered the question.

2347

1 THE COURT: Yes, sir.

2 THE WITNESS: Okay. Sorry.

3 THE COURT: Doctor, listen to the question. If
4 you don't understand it, feel free to ask it to be
5 repeated; but just answer what is asked, and then if
6 Mr. Piuze wants to go into it, he will get an
7 opportunity in redirect.

8 THE WITNESS: Okay.

9 BY MR. BLEAKLEY:

10 Q. Then a few months later in 1984, you
11 learned you weren't going to get your promotion?

12 A. A few months later than what? I kind of
13 lost track.

14 Q. After your wife filed her complaint with
15 the EEOC --

16 A. Yes.

17 Q. -- you were told that you weren't going to
18 be promoted?

19 A. That's correct.

20 Q. And you were very upset when you learned
21 about this, weren't you?

22 A. Well, yes. I assumed I would be leaving
23 the company. Yes, I was upset.

24 Q. You were embarrassed?

25 A. No, not when I was told that I wasn't
26 going to get the promotion. I think you are talking
27 about the insubordination.

28 Q. You were embarrassed when you were told

2348

1 that you weren't going to get the promotion, weren't you?

2 A. I don't recall being embarrassed, because
3 it was only Dr. Hauserman and Mr. Remmington and myself
4 that discussed it.

5 Q. You were embarrassed because you had told
6 everyone that you were about to be promoted and now you
7 weren't?

8 A. Everyone, yes.

9 Q. You were angry?

10 A. No, I wasn't angry.

11 Q. You weren't angry even though you weren't
12 going to get a promotion that you had expected and that
13 everybody had been told about?

14 A. No. Because from the date my wife filed
15 the complaint, I sort of assumed I wouldn't be getting a
16 promotion.

17 Q. And so when you were told that you weren't
18 going to get a promotion, you went out and got yourself
19 a lawyer?

20 A. No. I asked my boss, Dr. Hauserman, what
21 to do, and he advised me that he could not tell me, that
22 I should go out and get a lawyer.

23 Q. You did go out and get a lawyer, didn't
24 you?

25 A. I got a lawyer and I did not do anything
26 about it until I had a chance to talk it over with
27 Dr. Hauserman. So I wrote Dr. Hauserman a memo saying,
28 "When you get back from your vacation, let's discuss

2349

1 this. I have told my attorney to prepare to file an
2 EEOC complaint, but don't do it until we have a chance
3 to discuss it."

4 MR. BLEAKLEY: Your Honor, I am handing
5 Defendants' Exhibit 5522 to the witness.

6 THE COURT: Just one second. And would you
7 describe, without telling me its contents, what exhibit
8 5522 is.

9 MR. BLEAKLEY: It is a memorandum dated June 26,
10 1984 to M. Hauserman from W.A. Farone.

11 THE COURT: Give me a moment.

12 THE COURT: Have you shown that to Mr. Piuze?

13 MR. BLEAKLEY: I have.

14 THE COURT: Mr. Piuze, is there any objection to
15 it being received in evidence?

16 MR. PIUZE: No, there is no objection.

17 THE COURT: Exhibit 5522 is received in
18 evidence.

19 * (Received in evidence Joint
20 Exhibit number 5522, document.)

21 BY MR. BLEAKLEY:

22 Q. While we are waiting for the Elmo to warm
23 up so that we can see this document, Dr. Farone, would
24 you read this memorandum to the jury, please.

25 A. The whole thing?

26 Q. Yes.

2350

1 A. Okay. (Reading:)
2 "June 26, 1984.
3 "Personal and Confidential
4 "To: M. Hauserman
5 "From: W.A. Farone.
6 "This is to advise you that
7 on June 25, 1984 I retained an
8 attorney for the purpose of
9 taking whatever legal actions are
10 necessary to protect my career
11 from what I
12 perceived as discriminatory
13 treatment. As we discussed I
14 believe that promises made to me
15 by senior management were not
16 kept and that the major reason
17 for this was my wife's complaint
18 against the company. As we know,
19 our senior management buys
20 millions of dollars of equipment
21 and tobacco on a 'handshake'
22 basis and thus I saw no reason to
23 doubt the authority of the
24 commitments made to me and see no
25 reason why those commitments have
not been continued other than my
wife's problem with her

management. In all other areas

1 of business commitments of such a
2 nature do not change -- sorry --
3 in all other areas of business
4 commitments of such a nature do
5 not change with management.

6 Since the promises were witnessed
7 by and stated in front of my
8 peers and greatly affected my
9 career the future needs to be
10 clarified.

11 "I have instructed my
12 attorney to prepare to file a
13 complaint but not to file it
14 pending your return from vacation
15 and your advice on how to
16 proceed, i.e., your determination
17 with senior management on our
18 ability to negotiate a mutually
19 satisfactory solution.

20 "I have worked hard and if I
21 believe my reviews, successfully,
22 but the developments of this year
23 have put eight years of hard
24 work in jeopardy.

"Signed W.A. Farone."

25 Q. And that is your signature at the bottom?

26 A. It is.

27 Q. And you did retain an attorney on June 25,

1 1984?

2 A. Yes, I did.

3 Q. And as you told Dr. Hauserman, you
4 instructed him to prepare to file a complaint?

5 A. Not a lawsuit, an EEOC complaint, yes.

6 Q. That is not litigation against Philip
7 Morris?

8 A. Not in my opinion. According to the
9 attorney, that wasn't. It's a complaint that goes
10 through an arbitration procedure that isn't a lawsuit.

11 Q. You wanted Dr. Hauserman to know that your
12 attorney was going to take whatever legal action was
13 necessary to protect your career?

14 A. Dr. Hauserman advised me to get the
15 attorney, and I'm telling him that I did it and now we
16 need to talk about it.

17 Q. And your goal in doing so was to inform
18 Dr. Hauserman that you were unhappy, that you were
19 demanding a satisfactory resolution of the problem, and
20 that if it wasn't, you were going to file a complaint
21 with the EEOC?

22 A. Yes. Because normally in situations like
23 this, you're terminated and you get a year's severance
24 or something like that so that you can get on with your
25 life, and that's the mutually satisfactory solution.

26 Q. You mentioned commitments that had been
27 made to you. Your commitment is the agreement that you
28 thought you had that you were going to be promoted to be

1 the head of R&D?

2 A. Yes. That's one of the commitments. To
3 my wife's commitment also.

4 Q. The memorandum also says:

5 "Since the promises were
6 witnessed by and stated in front
7 of my peers and greatly affected
8 my career, the future needs to be
9 clarified."

10 You are talking about the promotion?

11 A. Yes. Within Philip Morris, because
12 obviously, if you were instructed by your boss to go out
13 and tell all your subordinates that you are going to be
14 promoted and you have actually selected one of them to
15 take your place, then when you go back and talk, "Well,
16 I'm not going to get promoted anymore," you have to
17 explain the whole thing to them.

18 Q. And did you file a complaint with the
19 EEOC?

20 A. You know, I don't really know whether it
21 was filed or not. I think the lawyer -- after I was
22 fired, I think he may have filed the complaint, but we
23 resolved it between Philip Morris and myself.

24 Q. You resolved it?

25 A. Yes.

26 Q. You mean the complaint with the EEOC?

27 A. Yes. The complaint with the EEOC was
28 withdrawn, as far as I understand, my wife's complaint.

2354

1 Q. In addition to sending this letter to
2 Dr. Hauserman, you told some of your own subordinates --

3 A. I was instructed that --

4 Q. May I finish my question, please?

5 A. Sure.

6 Q. You told some of your subordinates that
7 you had been to see a lawyer about the situation?

8 A. Yes, I did.

9 Q. You told your subordinates that you were
10 thinking about filing a complaint with the EEOC, didn't
11 you?

12 A. I don't think I put it in those words;
13 but, yes, they knew I was instructed by Dr. Hauserman to
14 inform my subordinates what was going on, part of our
15 succession planning philosophy that we had.

16 Q. Now, let's jump ahead to July 6, 1984.
17 That's the date you were fired, right?

18 A. Well, I'm not sure. That's the day I was
19 told by Mr. Case I was fired. Dr. Hauserman told me a
20 different story.

21 Q. You were asked to come to the office of a
22 Mr. Barry Case?

23 A. That is correct.

24 Q. He was the director of human resources or
25 something like that?

26 A. Something like that, yeah.

27 Q. When you got there, Dr. Hauserman was
28 there, right?

2355

1 A. That is correct.

2 Q. And you were told by Mr. Case that you
3 were being terminated for insubordination?

4 A. That's what Mr. Case said.

5 Q. He read to you from a piece of paper,
6 didn't he?

7 A. Well, he had papers on his desk and he
8 read something, yes.

9 Q. And the insubordination that Mr. Case
10 referred to was threatened litigation and telling your
11 subordinates about it; isn't that right?
12 A. That's what he referred to. That's not
13 what my boss told me was the reason for my termination.
14 MR. BLEAKLEY: This is Exhibit 5523. It is an
15 unsigned typewritten single-page document that doesn't
16 have a title, your Honor.

17 THE COURT: Is it dated?

18 MR. BLEAKLEY: It is dated -- it is not dated,
19 but there is a handwritten note at the bottom that says
20 "7-6-84" in the bottom right-hand side.

21 THE COURT: Is that going to be offered in
22 evidence?

23 MR. BLEAKLEY: Yes, your Honor.

24 THE COURT: Mr. Piuze, have you seen it?

25 MR. PIUZE: Yes.

26 THE COURT: Do you have any objection to it
27 being offered into evidence?

28 MR. PIUZE: No.

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1 THE COURT: All right. It is received in
2 evidence.

3 * (Received in evidence Joint
4 Exhibit number 5523, document.)
5

6 THE COURT: Go ahead.

7 BY MR. BLEAKLEY:

8 Q. Would you read the first sentence of this
9 document.

10 A. Yes. (Reading:)

11 "You are being terminated
12 from employment due to
13 irreconcilable differences with
14 management and an attitude of
15 insubordination demonstrated by
16 statements made to other
17 employees regarding your
18 threatened litigation."

19 Q. Now let me ask you this: Would you agree
20 with me that from Philip Morris' point of view, it would
21 be undesirable to have someone who is leading a major
22 department of the company, who was talking with his
23 subordinates about a threatened lawsuit against -- to
24 see a lawyer?

25 A. No. It was policy to discuss such issues
26 with your immediate subordinates; and in the past, I
27 have protected Philip Morris from many lawsuits by

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1 having such discussions with subordinates who were
2 unhappy with the company; but I could see from their
3 perspective -- I think that's the question, right, from
4 their perspective? -- I can understand what you are
5 saying.

6 Q. You can understand from their perspective
7 that it would be undesirable to have a person who is
8 going to be the head of a major department telling his
9 subordinates that he was threatening a lawsuit?

10 A. Yes. Yes. Yeah. Certainly.

11 Q. When you were told that you were fired,
12 you were very upset, weren't you?

13 A. Yes, I was.

14 Q. You were shocked?
15 A. Absolutely, the way it was done.
16 Q. You thought you were being treated rudely?
17 A. Yes.
18 Q. You thought that you were being treated
19 unprofessionally?
20 A. That is correct.
21 Q. And you told Mr. Case that he was making a
22 big mistake?
23 A. I did. I told him that because my boss is
24 accusing me of things that my boss told me to go and
25 do -- and Dr. Hauserman was really upset with Mr. Case.
26 Q. And then you said in Latin, "The die is
27 cast," didn't you?
28 A. Not to Mr. Case, to Dr. Hauserman who was

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1 a friend of mine and who we had talked. The fates have
2 decided, yes. "De jaelia jacta est," I'm history.
3 Q. "The die is cast" is an expression that
4 was used by Julius Caesar when he made the decision that
5 he was going to cross a river called the Rubicon and go
6 to war; isn't that right?
7 A. That is correct.
8 Q. And that's what you told Dr. Hauserman?
9 A. Dr. Hauserman, who spoke Latin with me,
10 often understood the meaning, not war.
11 Q. And you have testified against Philip
12 Morris 30-some times?
13 A. Approximately.
14 Q. And for a long time you did it for free?
15 A. From 1994 to the year 2000.
16 Q. You would go Florida, New York,
17 New Jersey, wherever, and do it for free?
18 A. Pro bono.
19 Q. Pro bono?
20 A. Another Latin term.
21 Q. But not because you were getting back at
22 Philip Morris?
23 A. No. Because I felt guilty for the people
24 that died while I worked there.
25 Q. Now, I want to ask you some questions
26 about some of the specific subjects you talked about
27 yesterday and last Thursday. I am not going to ask you
28 any questions about the position that the company was

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1 taking on causation and addiction with one exception,
2 and that is this document entitled, "The Cigarette
3 Controversy; Why More Research is Needed" received in
4 evidence as Exhibit 456.
5 Do you remember that document?
6 A. I believe so.
7 Q. That's a document prepared by The Tobacco
8 Institute in 1984?
9 A. Yes.
10 Q. And it was a document submitted by The
11 Tobacco Institute to the United States Congress, right?
12 A. Yes.
13 Q. And it was submitted to the United States
14 Congress in an effort to persuade the Congress not to
15 adopt a new and stronger package warning than had
16 previously been on cigarette packs, right?
17 A. I'm not sure the reason it was submitted.
18 I don't recall that.

19 Q. That's what it says in the document,
20 doesn't it?
21 A. Yes.
22 THE COURT: Counsel, if you are going to
23 question him about the language of a multipage document,
24 it seems to me he ought to have a copy of it in front
25 of him. Then you can go ahead and question him as you
26 wish.
27 MR. BLEAKLEY: I would put it on the Elmo if I
28 could get it to work.

2360

1 THE COURT: I understand the problem.
2 MR. BLEAKLEY: We haven't quite figured it out
3 yet. It's my turn. Mr. Piuze is getting back to us for
4 having it not work yesterday.

5 (A pause in the proceedings.)

6 THE COURT: I have no problem with your standing
7 next to the witness so that both of you can see the
8 document.

9 MR. BLEAKLEY: Thank you.

10 THE COURT: And if you are blocking some of the
11 jurors, make sure they can hear you.

12 BY MR. BLEAKLEY:

13 Q. Do you recognize Exhibit 456?

14 A. Yes, I do.

15 Q. And in the first paragraph of the
16 introduction, the document states that -- why don't you
17 read it the first paragraph.

18 A. (Reading:)

19 "The worldwide campaign
20 being waged against cigarette
21 smoking continues. There are
22 calls in many countries for
23 further restrictions on the
24 growing, manufacture, marketing,
25 and use of tobacco. In the
United States, bills to put
stronger warning labels on
cigarette packs and in

2361

1 advertisements were introduced in
2 the House of Representatives and
3 the Senate in 1982 and 1983.
Lengthy hearings were held in
both houses of Congress."

6 MR. BLEAKLEY: Thank you.

7 Q. So this document was being submitted to
8 the Congress in response to those bills, right?

9 A. Yes.

10 Q. In fact, the Congress went ahead and
11 passed the legislation anyway, didn't they?

12 A. They changed the labels, yes.

13 Q. And they adopted a label in 1985 that,
14 among other things, said cigarette smoking causes lung
cancer?

16 A. That is correct.

17 Q. And that package warning has been on
18 cigarette packs since 1985?

19 A. Well, there's more than one warning on the
20 packs. That's one of the ones --

21 Q. They rotate them?

22 A. Yes.

23 Q. And that warning, "Cigarette Smoking

24 Causes Lung Cancer," has been on cigarette ads since
25 1985 as well?
26 A. Yes. Again, rotating warnings.
27 Q. Let's talk for a moment about the Council
28 for Tobacco Research. It was called the Tobacco

2362

1 Industry Research Committee for several years and then
2 the name was changed to the Council for Tobacco
3 Research, right?

4 A. That is correct.

5 Q. And you mentioned Exhibit 422, a letter
6 from Dr. Seligman of Philip Morris to Dr. Spears at
7 Lorillard. Do you remember that?

8 A. Yes.

9 Q. 422. And you said that Dr. Spears had
10 been involved with CTR, right?

11 A. That's correct.

12 Q. And you told the jury that one of the
13 things on this memorandum was subjects to be avoided,
14 and one of them was attempt to relate human disease to
15 smoking.

16 A. One of the three things not to do, yes.

17 Q. Was attempts -- the other one was
18 developing new tests for carcinogenicity; and third,
19 conduct experiments which require large doses of
20 carcinogen to show addictive effect of smoking, right?

21 A. That's correct.

22 Q. Now, the fact of the matter is that
23 different people at Philip Morris had differing views
24 about what the Council for Tobacco Research should be
25 doing, didn't they?

26 A. That is correct.

27 Q. There were disagreements among Philip
28 Morris people about what CTR should be doing?

2363

1 A. That's true.

2 Q. You didn't have anything to do with the
3 process by which grants or research was done at CTR, did
4 you?

5 A. No. I can only influence it through
6 Dr. Seligman and Dr. Osdene.

7 Q. And you did not have contact with the
8 scientific advisory board which made the decisions about
9 what grants to make and what grants not to make?

10 A. I did not.

11 Q. But you do know that it was the scientific
12 advisory board of the Council for Tobacco Research that
13 chose and approved the research projects that were done?

14 A. Most of the projects, that's true.

15 Q. And you know that the scientists funded by
16 CTR grants were independent scientists?

17 A. For most cases that's true.

18 Q. There were hundreds of them, weren't
19 there, who received CTR grants?

20 A. Yes.

21 Q. Among these scientists were people highly
22 respected in their fields?

23 A. That's correct.

24 Q. Some of them were Nobel prize laureates?

25 A. That's true.

26 Q. Among the people who received CTR grants
27 were Dr. Neal Benowitz, who testified earlier in this
28 case; isn't that right?

1 A. That's true.

2 Q. No one would accuse Dr. Benowitz of being
3 in the pocket of the tobacco industry, would they?

4 A. I don't know the answer to that.

5 Q. You also know that many of the research
6 grants that were funded by the Council for Tobacco
7 Research over the years were co-funded by scientific
8 organizations having nothing whatsoever to do with the
9 tobacco industry?

10 A. It's probably true, although I'm not quite
11 sure what you mean by not having anything to do with the
12 tobacco industry.

13 Q. Well, I am going to ask you about that.

14 A. Okay.

15 Q. You know that Council for Tobacco Research
16 funded projects in many cases were co-funded, that is,
17 some of the funds were provided by the Council for
18 Tobacco Research and some of them were provided by other
19 scientific organizations?

20 A. That is correct.

21 Q. You know, for example, that there have
22 been CTR grants and research conducted pursuant to those
23 grants that were co-funded by the National Institutes of
24 Health?

25 A. Yes, I do.

26 Q. Which includes the National Cancer
27 Institute?

28 A. That's correct.

1 Q. It has nothing to do with the tobacco
2 industry, does it?

3 A. It does.

4 Q. Is it in the pocket of the tobacco
5 industry?

6 A. I don't know, but it has to do with trying
7 to reduce carcinogenicity from tobacco products. It has
8 a lot to do with the tobacco industry.

9 Q. So you didn't understand my question?

10 A. That's what I was getting at before. I
11 don't know what you meant, "it had nothing to do with."

12 Q. You also know that CTR grants and research
13 have been co-funded by the National Institute on Drug
14 Abuse.

15 A. That is correct.

16 Q. The National Academy of Sciences?

17 A. I believe that's correct.

18 Q. The American Cancer Society?

19 A. Yes.

20 Q. The American Heart Association?

21 A. Yes.

22 Q. The American Lung Association?

23 A. Yes.

24 Q. The U.S. Public Health Service?

25 A. Yes.

26 Q. And the Veterans Administration?

27 A. I'm not sure about that one, but probably.

28 Q. And the Environmental Protection Agency?

1 A. Probably.

2 Q. These organizations -- whose goal in every
3 case is for the good of the public health, correct?

4 A. Yes.

5 Q. -- agreed to co-fund projects that were
6 partially funded by the Council for Tobacco Research?
7 A. That is correct.

8 Q. They put their money in the same place
9 that the Council for Tobacco Research was putting it?

10 A. That's correct.

11 Q. You also know that before you ever got to
12 Philip Morris, CTR grantees had been publishing their
13 research for many years?

14 A. Some of them, that's true.

15 Q. You know that the published research of
16 many CTR grantees has been cited in Surgeon General's
17 reports over the years?

18 A. That is correct.

19 Q. You know, for example, that in the
20 original Surgeon General's report in 1964, the Surgeon
21 General cited more than 40 studies that had been funded
22 or co-funded by CTR?

23 A. I really wasn't aware of that fact, but I
24 don't dispute it.

25 Q. And you know that over the years, hundreds
26 and hundreds of studies funded by CTR have been cited in
27 Surgeon General's reports?

28 A. I have never counted them, but --

2367

1 Q. Well, you do know this: You do know that
2 many of the studies funded by the Council for Tobacco
3 Research reached conclusions or made findings that were
4 not particularly favorable to the tobacco industry?

5 A. That I do know, yes.

6 Q. Now, let's talk a moment about INBIFO. Do
7 you remember INBIFO?

8 A. Yes, very well.

9 Q. INBIFO was a laboratory in Germany, right?

10 A. It's a company, yes.

11 Q. A company in Germany.

12 INBIFO was a well-known, highly
13 respected, well-qualified research laboratory in
14 Germany, wasn't it?

15 A. That is correct.

16 Q. The word "INBIFO" is actually an acronym
17 for the German words that stand for Institute for
18 Biological Research, right?

19 A. That is correct.

20 Q. And INBIFO was well-known and
21 well-recognized as experts on doing biological research?

22 A. That is correct.

23 Q. They conducted mouse skin painting
24 studies, right?

25 A. Yes.

26 Q. They conducted animal inhalation studies?

27 A. Yes.

28 Q. They conducted in vitro studies?

2368

1 A. Yes.

2 Q. Before Philip Morris acquired them, right?

3 A. Yes.

4 Q. And after Philip Morris acquired them?

5 A. Yes.

6 Q. Now, there's nothing wrong per se with an
7 American company having biological research done for it
8 in a laboratory in Europe, is there?

9 A. Not per se, no.

10 Q. When you were at Lever Brothers, Lever
11 Brothers did it, didn't they?
12 A. Well, Lever is owned by Unilever, which
13 has its headquarters in Europe; but yes, we did.
14 Q. And INBIFO did research for companies
15 other than Philip Morris too, didn't it?
16 A. Yes, they did.
17 Q. In fact, back in the 1960s and even in the
18 in the 1970s, lots of American companies gave contracts
19 to INBIFO to do biological testing?
20 A. That's correct.
21 Q. INBIFO did both mouse skin painting and
22 animal inhalation tests, which are not easy to do, are
23 they?
24 A. Well, they not easy to do. Any animal
25 test is difficult.
26 Q. They are very complicated?
27 A. Protocols are very rigorous, yes.
28 Q. You have to know the right kind of animals

2369

1 to use, right?
2 A. Yes.
3 Q. You have to be an expert to do this?
4 A. Yes.
5 Q. And INBIFO was an expert?
6 A. That's correct.
7 Q. You had to have people who knew what they
8 were doing, like veterinarians?
9 A. Yes.
10 Q. You had to have special equipment?
11 A. Yes.
12 Q. And INBIFO had all of that?
13 A. Yes. That's true.
14 Q. You didn't have anything to do with the
15 acquisition of INBIFO by Philip Morris, did you?
16 A. I didn't even know we owned it until after
17 I left Philip Morris.
18 Q. Now, there was a lot of research going
19 back and forth between INBIFO and the R&D department in
20 Richmond, wasn't there?
21 A. Yes.
22 Q. When you were at Philip Morris, you saw
23 INBIFO research documents all the time?
24 A. Well, I don't know about all the time, but
25 I certainly saw INBIFO research documents.
26 Q. Lots of them?
27 A. Yes.
28 Q. And you never saw Dr. Osdene destroy --

2370

1 you never saw Dr. Osdene destroy a document, did you?
2 A. That's correct.
3 Q. Did you ever go to INBIFO while you were
4 at Philip Morris?
5 A. No. I was not allowed to.
6 Q. You had no responsibility for INBIFO?
7 A. No responsibility for INBIFO, that's
8 correct.
9 Q. You also know that there are over 840,000
10 pages of INBIFO documents in a warehouse up in
11 Minnesota, don't you?
12 A. I didn't know the exact number.
13 Q. Thousands and thousands?
14 A. 206,000 documents, I know that number.

15 Q. And most of them are available on the
16 internet, aren't they?
17 A. Yes, they are.
18 Q. In fact, you have spent some time on the
19 internet looking at them, haven't you?
20 A. I do, yes.
21 Q. Okay. Let's move to a different subject.
22 N-O-D, NOD.
23 THE COURT: Counsel, I don't mean to interrupt
24 your train of thought, but we are close to a breaking
25 time and --
26 MR. BLEAKLEY: That's fine.
27 THE COURT: I thought perhaps you would rather
28 do it before you got into a new subject.

2371

1 MR. BLEAKLEY: That's fine.
2 THE COURT: All right. Ladies and gentlemen, I
3 would admonish you not to discuss this case amongst
4 yourselves or with anyone else. Do not form or express
5 any opinion until it's finally submitted to you; and we
6 will be in recess for 15 minutes.
7

8 (The following proceedings were held
9 in open court outside the presence
10 of the jury:)

12 THE COURT: All right. The jurors have left
13 the courtroom.

14 My only question: Is there anything else
15 at this point we need to put on the record?

16 MR. PIUZE: Yes. The amount of sanctions
17 against the Elmo man.

18 MR. BLEAKLEY: I thought I figured it so it
19 would work when I was doing it.

20 THE COURT: All right. Fifteen minutes.

21 MR. LEITER: Thank you, your Honor.

23 (A recess was taken in the proceedings.)

25 (The following proceedings were held
26 in open court within the presence of
27 the jury:)

1 THE COURT: The record will reflect that the
2 jury is in the box, the witness is on the stand. You
3 have previously been sworn, and we are now going to talk
4 about NOD.

5 MR. BLEAKLEY: Thank you, your Honor.

6 Q. N-O-D, NOD. Actually, I have a couple of
7 preliminary questions I want to ask you before we talk
8 about the NOD Project.

9 People have different views about what may
10 produce a safe cigarette, don't they?

11 A. Yes.

12 Q. Not everybody agrees to what is the best
13 way to go about it?

14 A. That's correct.

15 Q. Reasonable scientists disagree with one
16 another?

17 A. Yes.

18 Q. And you would agree with me that the
19 design of cigarettes is a pretty complex subject?

2372

20 A. Would I agree.
21 Q. There are a lot of problems in trying to
22 develop safer cigarettes?
23 A. Yes.
24 Q. A company can have thousands and thousands
25 of employees making a lot of decisions, and reasonable
26 people can still disagree about the best way to go about
27 it, can't they?
28 A. I'm not sure I understand the connection,

2373

1 but yes.
2 Q. Scientists have a right to disagree with
3 one another?
4 A. They do.
5 Q. And they do disagree with one another,
6 don't they?
7 A. Not always, but they can and they do.
8 Q. The fact that a group of scientists
9 disagrees with another group of scientists or that an
10 individual scientist disagrees with another scientist
11 doesn't mean that either one is doing anything wrong,
12 does it?
13 A. Not necessarily. That's correct.

14 Q. You don't think that other scientists are
15 wrong just because they disagree with you, do you?

16 A. No, I don't.
17 Q. And they can reasonably differ on the
18 way, the best way, to make a safe cigarette?

19 A. They could.

20 Q. For example, some scientists have
21 suggested that a way to make cigarettes safe or safer
22 would be to take all the nicotine out of them, right?

23 A. That is correct.

24 Q. And other scientists have suggested that
25 not only should you not take out the nicotine but you
26 should put more nicotine in, right?

27 A. Well, not exactly. Change the nicotine to
28 tar ratio, reduce the carcinogens, and you can do that

2374

1 by --
2 Q. I didn't ask you how you do it.
3 A. Sorry.
4 Q. The question is: There are people who
5 think you should take it all out, right?
6 A. Yes.
7 Q. Dr. Neal Benowitz, for example, thinks you
8 should take all the nicotine out of cigarettes, right?
9 A. That's one approach, yes.
10 Q. On the other hand, there are scientists
11 who have suggested over the years, altering the nicotine
12 to tar ratio so that there's actually more nicotine in a
13 cigarette than naturally occurs, right?
14 A. No. It's not that naturally occurs. The
15 ratio as delivered gets changed. There's always more
16 nicotine in the cigarette than gets delivered.
17 Q. And you have been one of the scientists
18 who has suggested actually adding nicotine to cigarettes?
19 A. That's correct.
20 Q. But there are a lot of scientists who
21 disagree with you that that's the best way to go about
22 making a safe cigarette, isn't it?
23 A. I don't know about a lot, but certainly
24 there are people who disagree.

25 Q. Respected independent scientists not
26 associated with the tobacco industry?

27 A. That's correct.

28 Q. There's also been disagreement -- or let

2375

1 me change the question.

2 There has not been a consensus in the
3 scientific community that reducing any single
4 carcinogenic compound can prevent people from getting
5 cancer?

6 A. Well, I'm not sure I understand that
7 question.

8 Q. Well, your view, for example, is that you
9 have to get rid of them all?

10 A. Well --

11 Q. Isn't it?

12 A. Yeah. You can't just take out one and
13 leave the rest that are carcinogenic. You'd still have
14 cancer.

15 Q. Removing one won't be enough to make
16 cigarettes safe?

17 A. If you have more than one to start off
18 with, then removing one won't do it, yes.

19 Q. The fact is that a lot of these
20 constituents that are found in tobacco smoke, the
21 carcinogenic ones, react with one another, don't they?

22 A. Yes. They chemically react in the
23 cigarette as you burn it, yes.

24 Q. And if you change one of those, you might
25 have an affect on another, right?

26 A. That's potentially possible, yes.

27 Q. For example, some scientists believe that
28 the polycyclic aromatic hydrocarbons that you have been

2376

1 talking about here like benzo-pyrene are bad actors in
2 smoke, right?

3 A. The evidence says that they are
4 carcinogenic. I don't know about the belief.

5 Q. And you could add nitrates and reduce as a
6 result the polycyclic aromatic hydrocarbons, couldn't
7 you?

8 A. Well, you could, yes, okay. I'll buy that
9 one. You could do that.

10 Q. But if you did, nitrates make
11 nitrosamines?

12 A. That is correct.

13 Q. So that wouldn't be a good thing to do, to
14 add nitrates in order to reduce things like
15 benzo-pyrene, would it?

16 A. That's correct. It would not be a good
17 thing to do.

18 Q. So when you are a scientist and you are
19 trying to figure out how to make a safe or potentially
20 safer cigarette, you have to make decisions about which
21 things are worse and whether you do one thing, it will
22 make the product actually more dangerous? You have to
23 take all that into account, don't you?

24 A. You do.

25 Q. You have to set priorities too, don't you?

26 A. Yes.

27 Q. A reasonable scientist and a reasonable
28 manufacturing company sometimes has to make tradeoffs

2377

1 about what you are going to put your time and your
2 effort and your money in, don't you?
3 A. That is correct.
4 Q. You've talked about aldehydes, for
5 example. You said aldehydes are a dangerous component
6 constituent of smoke, right?
7 A. That is correct.
8 Q. Now, you could reduce aldehydes if you
9 took the sugar out of tobacco, couldn't you?
10 A. Yes.
11 Q. But there have been tests done that show
12 that when you reduce sugars, you actually increase the
13 polycyclic aromatic hydrocarbons; isn't that right?
14 A. The tests that I recall at Philip Morris
15 is the increase in sugars increase the mutagenicity.
16 Decrease in sugars decrease mutagenicity.
17 Q. And we could go through the same kind of
18 analysis with every one of the constituents in smoke.
19 My point being that you would agree that you have to be
20 careful about what you are taking out for fear of what
21 it will do to the tobacco?
22 A. That's correct. You essentially have to
23 take out all the carcinogens or to very low levels.
24 Q. Now, another factor that is an important
25 component of developing a safer cigarette is consumer
acceptability; isn't that right?
27 A. Well, it's a component, yes.
28 Q. It's an important component, isn't it?

2378

1 A. It depends on how you look at it. If the
2 intent is to continue to sell cigarettes, then it's an
3 important component.
4 Q. If the intent is to continue to provide a
5 product, consumer acceptability of that product is a key
6 component, isn't it?
7 A. If that's the premise, yes.
8 Q. In other words, you could make a long tube
9 that was essentially a brick and it would be safe,
10 wouldn't it?
11 A. I'm not sure, but I'll take that as a
12 hypothesis.
13 Q. But nobody would smoke it?
14 A. Pretty hard to smoke a brick. I'm not
15 sure I understand the question, but yes.
16 Q. I think you understand the question. The
17 question is that when you are talking about making a
18 safer cigarette, you have to produce something that
19 people will buy and smoke, don't you?
20 A. No, you do not.
21 Q. So if you produce a cigarette that tastes
22 so bad and is so hard to draw that nobody will buy or
23 smoke it, that's a safe cigarette?
24 A. Well, people won't get cancer from it. I
25 mean, that's one way. If you get out of the business,
26 if you're not in the business of selling cigarettes,
27 then you are not causing cancer from selling those
28 products.

2379

1 Q. But we are not talking about getting out
2 of the business. We are talking about developing a safe
3 cigarette that will be sold and consumed by people.
4 That's what we are talking about, isn't it?
5 A. Okay.

6 Q. And when you were at Philip Morris, what
7 you were trying to do is to develop a cigarette that
8 people would buy, pay money for, and smoke, weren't you?
9

10 A. That is one of my tasks. The other task
was to get them out of the business.

11 Q. One of your tasks was to develop a
cigarette that people would buy and smoke, wasn't it?

12 A. That is correct.

13 Q. Okay. And in order to develop a cigarette
14 that people would buy and smoke, you had to take
15 consumer acceptability into account, didn't you?

16 A. You did. That is correct.

17 Q. Okay. And taste is a very important
determinant of consumer acceptability, isn't it?

18 A. Well, I'm not quite so sure, but it has --
19 it plays a role, I will agree with you on that. I don't
20 know how important a role because without nicotine,
21 taste doesn't seem to matter, but. . .

22 Q. You have answered this question over and
23 over and over again in litigation, and you have told
24 juries that taste is an important component, haven't
25 you?

26 A. I haven't disagreed with you. I am just

27 2380

28 pointing out that taste isn't the key thing.

1 Q. And when you change the constituents in
2 smoke, you can affect the taste of a cigarette, can't
3 you?

4 A. Usually, yes. That's true.

5 Q. And sometimes the effect is it makes it
6 taste bad; isn't that right?

7 A. It makes it taste different, bad, yes.

8 Q. The draw of a cigarette is an important
9 component of cigarette acceptability too, isn't it?

10 A. Yes.

11 Q. If you can't draw the smoke through the
12 cigarette, people aren't going to buy it and smoke it,
13 are they?

14 A. Unless you do something else, that's
15 correct.

16 Q. And changes in cigarette design can affect
17 the draw of a cigarette, can't they?

18 A. Yes.

19 Q. Now, lightability, the ability to light a
20 cigarette and have it stay lit is an important component
21 of consumer acceptability too, isn't it?

22 A. No, not keeping it staying lit because of
23 the fire hazard.

24 Q. But you would agree that the ability to
25 light a cigarette -- and to light a cigarette means that
26 when you have finished with the match or the lighter, it
27 is lit?

28 2381

1 A. That's good. Yes. That you need.

2 Q. You don't do that -- if a cigarette goes
3 out all the time, that's going to affect consumer
4 acceptability, isn't it?

5 A. Now we are talking about it going out.
6 Before we were talking about being lit. I will agree
7 with you on -- that it's important to be able to light
8 it. It's also important that it go out so it doesn't
9 cause fires.

10 Q. It's an important -- it's important that

11 it stay lit, isn't it?
12 A. When you are not using it, no.
13 Q. No. When you are using it?
14 A. When you are using it, yes.
15 Q. If you take a cigarette and you light it
16 and it lights but then it immediately goes out, that's
17 going to affect consumer acceptability?
18 A. That's true.
19 Q. Odor can affect consumer acceptability
20 too; isn't that right?
21 A. Yes.
22 Q. If a cigarette stinks, people aren't going
23 to buy it and smoke it, are they?
24 A. Well, there are some -- I disagree with
25 that in principle because there are some cigarettes that
26 are sold based on the odor like clove cigarettes,
27 things like that. Some people find it reprehensible.
28 Some people find it acceptable.

2382

1 Q. How about a bad odor? Would you agree
2 with me that if a cigarette stinks, people aren't going
3 buy and it smoke it?
4 A. I can agree with that general principle.
5 Q. And changes that you make in the cigarette
6 to make them safer can affect all of these things we
7 have been talking about here, can't they?
8 A. It can, yes.
9 Q. Odor, draw, taste, lightability?
10 A. All of those things, that's correct.
11 Q. So when you are trying to design a safe
12 cigarette, you are trying to design one that is safer
13 and which tastes good, doesn't stink, stays lit, and
14 draws, right?
15 A. Yes, I would agree with that.
16 Q. Okay. Now, let's talk about the NOD
17 Project.
18 Removing nitrates from tobacco can reduce
19 the formation of nitrosamines and oxides of nitrogen,
20 right?
21 A. That is correct.
22 Q. So the idea of the NOD program and of
23 research that was going on at Philip Morris before you
24 got there was to reduce nitrates so that you could
25 reduce nitrosamines and oxides of nitrogen.
26 A. That is correct.
27 Q. And when you arrived at Philip Morris,
28 there was already such a program in place?

2383

1 A. There was the program we talked about
2 earlier.
3 Q. The crystallization program?
4 A. That's correct.
5 Q. Which removed 90 percent of the nitrates
6 from the finished reconstituted leaf?
7 A. That specific part of the blend. It
8 doesn't remove it from the whole cigarette.
9 Q. And that was a step in the right direction?
10 A. It was.
11 Q. And Philip Morris was still using
12 crystallization in the cigarettes that it made and sold
13 when you left Philip Morris in 1984?
14 A. That is correct.
15 Q. And so far as you know, it is still being

16 done today?
17 A. As far as I know.
18 Q. Okay. Now, the NOD Project was designed
19 to try to remove the other 10 percent?
20 A. Yes.
21 Q. NOD, I think you said, is naturally
22 occurring denitrification, correct?
23 A. That's an acronym for naturally occurring
24 denitrification.
25 Q. It used live organisms, microbacteria,
26 basically to eat the nitrates out of tobacco?
27 A. Yes. The bacteria that were already in
28 the tobacco. It didn't have to add any bacteria.

2384

1 Q. And the idea or the theory was that if
2 you -- these bacteria would remove those 10 percent of
3 the nitrates that weren't removed by crystallization?
4 A. In the RL and that could also remove it
5 from the rest of the leaf.
6 Q. And the rest of the leaf?
7 A. Yeah.
8 Q. The ultimate goal was to reduce and
9 hopefully eliminate nitrosamines and oxides of nitrogen?
10 A. Yes.
11 Q. The nitrates would be turned into harmless
12 nitrogen gas, right?
13 A. That's correct.
14 Q. This project started about 1977?
15 A. That's correct.
16 Q. And it was worked on by scientists in your
17 directorate?
18 A. Yes.
19 Q. You were sort of an in-house champion of
20 the project, weren't you?
21 A. Yes.
22 Q. You weren't the person who was actually
23 doing the work in the lab, though?
24 A. I did some of the analysis, but I didn't
25 work in the lab. That's correct.
26 Q. I'm probably repeating myself; but you
27 would agree that you don't simply solve all research and
28 development problems by just throwing money at them?

2385

1 A. I can agree with that, yes.
2 Q. Nevertheless, in this case, the NOD
3 Project, Philip Morris provided you and the other
4 scientists with all of the resources you needed to carry
5 out the NOD Project, didn't they?
6 A. They did.
7 Q. You asked the company to let you hire some
8 outside experts to help on it?
9 A. I did. Yes, I did.
10 Q. And they provided you with the funds to do
11 it?
12 A. Correct.
13 Q. You had all the outside experts you needed?
14 A. Universities from all over the country,
15 that's correct.
16 Q. Philip Morris built a pilot plant for
17 testing the NOD, right?
18 A. It was a very advanced pilot plant, that's
19 correct.
20 Q. It was the first company in the industry

21 to make this particular discovery, wasn't it?
22 A. Pretty close. There was one at B&W at
23 about the same time. It looks like it was either a
24 co-invention or a little cross-fertilization.
25 Q. But if they weren't the first, they were
26 certainly among the first?

27 A. Yes.

28 Q. And you said yesterday that there were

2386

1 some patents issued on the NOD process after you left
2 the company?

3 A. Yes, two patents on two different
4 processes.

5 Q. And when patents are issued, they become
6 public, don't they?

7 A. They do.

8 Q. As a matter of fact, you know that one of
9 the basic principles of the patent process is that you
10 get some protection from people infringing your patent,
11 but the price you pay is the technology becomes public?

12 A. That is correct.

13 Q. So the technology for NOD was public from
14 whenever those patents were issued in 1984 or 1985?

15 A. '86 and '87, I think.

16 Q. Anybody in the world who wanted to could
17 come in and look at the patents and experiment with the
18 technology, right?

19 A. They could experiment with it. They
20 couldn't do the process or they would be infringing the
21 patent.

22 Q. Right. But they do what's called reverse
23 engineering?

24 A. Yeah.

25 Q. Don't they?

26 A. Well, you can, but that's -- it depends on
27 the strength of the patent.

28 Q. Now, you said that the NOD Project was

2387

1 ready to be used in cigarettes by 1980, right?

2 A. That's an independent verification made by
3 Susan Dobberstein.

4 Q. But there were people at Philip Morris,
5 scientists in your directorate, who didn't think that it
6 was ready to go; isn't that right?

7 A. In 1980?

8 Q. Yeah.

9 A. I don't think so.

10 Q. No one.

11 So if someone came in here and told this
12 jury that there were people who believed that it wasn't
13 ready for commercialization, they would be wrong?

14 A. They would be wrong if they said that was
15 true of the 1980 process. They would not be wrong if
16 they said it was true of the process that started in --
17 after the first one because that is, in fact, the case,
18 that people did say the second one was not ready to go.

19 Q. You received memos from people who told
20 you that they didn't think it was ready to go, didn't
21 you?

22 A. Which one?

23 Q. NOD.

24 A. Well, there's two NOD Projects, so we have
25 to be careful about which one we are talking about.

26 Q. Okay. So your testimony is that no one at
27 Philip Morris said to you that they didn't think any NOD
28 Project was ready for commercialization?

2388

1 A. No. That's not my testimony. I've
2 testified that the first -- the first NOD Project was
3 too expensive. So people told us it wasn't ready to go
4 because of two problems: Number one, it was too
5 expensive; and the second one is that the amount of
6 reduction may not be reproducible, but it was always a
7 significant amount, but it may not be reproducible every
8 time.

9 Q. So if somebody came in here and told this
10 jury that in their opinion -- somebody who worked on the
11 project came in here and told -- said to this jury that
12 they didn't think that any NOD Project was ready for
13 commercialization and that they told you that no NOD
14 Project was ready for commercialization, they would be
15 lying?

16 A. The only person I have ever heard make
17 that -- did not work on the project. Yes, they would be
18 lying.

19 Q. Okay. Now, you started to say, "The only
20 person." I'm going to let you finish that answer. The
21 only person what?

22 A. Well, there's two groups of people who
23 worked on it; and the people who worked on the second
24 project, like Dr. Jerry Whidby, weren't even involved in
25 the first project.

26 So I have heard Dr. Jerry Whidby -- I have
27 seen testimony where he said that the project he worked
28 on was not ready for commercialization, but he was not

2389

1 even involved in the first project.

2 So that's, you know, one of those things
3 that I find confusing, to say the least.

4 Q. Dr. Whidby called to your attention
5 certain problems that had not, in his opinion, been
6 overcome with the NOD Project, didn't he?

7 A. In the second project. He wasn't even
8 part of the first project.

9 Q. You were told, were you not, that the NOD
10 Project wasn't ready for commercialization because of
11 its taste?

12 A. That's the second project. That's correct.

13 Q. I want you to keep saying that it's the
14 second project and not the first.

15 The first one tasted just fine, right?

16 A. The consumer tests in the first one, as I
17 recall them, mentioned in the Dobberstein memo it had
18 been substituted, I think, 13 to 15 percent of the
19 filler and was found acceptable in consumer testing.
20 That's what I recall. Now, maybe I am mistaken, but
21 that's what I recall.

22 Q. So that if someone came in here and said
23 to this jury that NOD -- sheet produced using NOD was
24 found to be unacceptable due to the presence of
25 undesirable characters in both rod aroma and taste; the
26 characters were described as dirty, barnyard, fecal, and
27 green, your testimony is that did not apply to the first
28 NOD Project?

2390

1 A. That's my recollection based on the

2 conclusion of that project in about 1980.

3 Q. Now, there was a NOD research project that
4 was still going on when you left in 1984, wasn't there?

5 A. That is correct.

6 Q. A lot of time and effort and money went
7 into that project, didn't it?

8 A. It did.

9 Q. And the people who were involved with it
10 had only one goal in mind, and that was to try to
11 develop a product that would remove that other
12 10 percent from reconstituted leaf and some or all of
13 the nitrates from the rest of the tobacco, right?

14 A. And they were successful.

15 Q. But it wasn't incorporated into a
16 commercial product, in your opinion, because Philip
17 Morris wouldn't spend the money?

18 A. That's correct.

19 Q. Now, Philip Morris had already spent
20 millions and millions of dollars on the NOD Project
21 during the years before it was terminated, hadn't it?

22 A. Yes.

23 Q. And your testimony is that it wouldn't
24 spend the additional money, it was too cheap to spend
25 the additional money?

26 A. No, that's not my -- Philip Morris is not
27 cheap. It was estimated to be between \$60- and
28 \$100 million, and it also admitted that there was a

2391

1 problem.

2 Q. Haven't you previously testified that the
3 cost was going to be \$57 million?

4 A. That's -- it's in the Dobberstein memo.

5 We could look at it. Whatever it says there is what it
6 said, but it was a lot of money.

7 Q. Now, Philip Morris spent hundreds and
8 hundreds of millions of dollars developing a cigarette
9 that contained little or no nicotine, right?

10 A. \$300 million, I think, is the number.

11 Q. \$300 million they spent developing a
12 cigarette that contained little or no nicotine in the
13 1980s; built a plant just to make that cigarette, right?

14 A. Right.

15 Q. Which failed in the marketplace, right?

16 A. I'm not sure.

17 Q. In any event, they spent \$300 million, but
18 they wouldn't spend \$57 million to develop a project
19 that they had already spent years and millions of
20 dollars on. That's your testimony?

21 A. That's my testimony.

22 Q. But your testimony also is that a NOD
23 Project continued after you left Philip Morris?

24 A. That's correct.

25 Q. And when and if it was terminated, you
26 have no personal knowledge of the reasons, do you?

27 A. Personal knowledge?

28 Q. Yes, personal knowledge.

2392

1 A. You mean other than reading about it in
2 things that I found in --

3 Q. Right.

4 A. Yes. No, I don't.

5 Q. Let's talk a little bit about whole
6 product testing. Okay?

7 A. Okay.

8 Q. Let's begin with this: All commercial
9 brands of cigarettes that have been made and sold in the
10 United States in the last 50 years cause cancer; isn't
11 that right?

12 A. I don't know if there's any evidence to
13 that effect.

14 Q. Do you know of a brand that does not cause
15 cancer?

16 A. We talked about levels of cancer. I don't
17 see how the 0.0 milligrams of tar can cause cancer.
18 There's no carcinogens to the smoker.

19 Q. We will talk about Cambridge in a few
20 minutes.

21 A. Or Carlton or there's other brands besides
22 Cambridge.

23 Q. It is your testimony that it has been
24 scientifically demonstrated to a reasonable degree of
25 scientific probability that Carlton or Cambridge do not
26 cause cancer in human beings?

27 A. No. There's evidence to that effect. It
28 has not been demonstrated to a reasonable degree of

2393

1 scientific certainty.

2 Q. Certainly you would agree with me that all
3 brands of cigarettes with comparable levels of tar cause
4 cancer?

5 A. I don't even know what that means. If the
6 comparable levels are all zero, the answer is no. If --

7 Q. Fair enough. It was a bad question.

8 Let's take Benson & Hedges 100s. Okay?

9 You know that's what the plaintiff in this
10 case smoked for 30-some years, right?

11 A. Yes.

12 Q. You have been told that.

13 There is no evidence that Benson & Hedges
14 100s are more or less likely to cause cancer than other
15 cigarettes with comparable levels of tar, is there?

16 A. Unfortunately, there is some evidence, but
17 it's not beyond a reasonable degree of scientific doubt,
18 but there is some evidence.

19 Q. There is no evidence to a reasonable
20 degree of scientific probability, which is what we are
21 talking about, that Benson & Hedges 100s are more or
22 less likely to cause cancer than other cigarettes
23 containing -- what was the amount you said in Benson &
24 Hedges 100s?

25 A. 15 or 16 milligrams.

26 Q. -- 15 or 16 milligrams of tar, is there?

27 A. There's evidence that there's no
28 carcinogens in that tar; but again, not to a reasonable

2394

1 scientific doubt when you look at it from a viewpoint of
2 population.

3 Q. And we are only asking about evidence to a
4 reasonable degree of scientific probability. Okay?

5 A. That's okay.

6 Q. And the public health community has said,
7 and still says, that there is no such thing as a safe
8 cigarette; isn't that right?

9 A. Well, that's correct. Safe, safer,
10 there's two different things.

11 Q. The public health community has said, and

12 still says, there is no such thing as a safe cigarette?

13 A. That is correct.

14 Q. And they have said that there is, and
15 still say, that there is no safe level of consumption;
16 isn't that right?

17 A. That is correct.

18 Q. And except for low-tar brands, the public
19 health community has never endorsed one kind of
20 cigarette over another, have they?

21 A. Except for low-tar brands. I'm not sure.
22 You mean endorsed lower tar. Whether it's in a low-tar
23 brand or not doesn't matter. They have endorsed
24 reduction of tar. We talked about that.

25 Q. Other than that, the public health
26 community never has and does not today embrace or
27 endorse one cigarette over another?

28 A. That's correct.

2395

1 Q. As far as the public health community is
2 concerned, they are all dangerous?

3 A. All cigarettes have the capability of
4 providing disease of some type, yes.

5 Q. And as you and others have suggested,
6 there's even some question today about whether the
7 so-called low-tar brands are safer or how much safer
8 they are?

9 A. That is correct.

10 Q. It is also true, is it not, that no public
11 health authority or organization has ever endorsed any
12 test as a means for determining whether one brand of
13 cigarettes is safer than another?

14 A. I'm not sure I understand the question.

15 THE COURT: Would you like to have it read?

16 THE WITNESS: Yes, please. Would you re-read
17 that?

18 BY MR. BLEAKLEY:

19 Q. It is a fact, is it not, that no public
20 health authority or organization has ever endorsed any
21 test as a means for determining scientifically whether
22 one brand of cigarettes is safer than another?

23 A. I think that's correct, yes.

24 Q. Now, the fact of the matter is that Philip
25 Morris did a lot of testing of cigarettes at its
26 laboratory in Richmond, at contract laboratories, and at
27 INBIFO, didn't it?

28 A. Yes, they did.

2396

1 Q. It did smoke chemistry tests on commercial
2 brands of cigarettes, didn't it?

3 A. Smoke chemistry, it did, yes.

4 Q. And it did a lot of biological research on
5 reference and research cigarettes, didn't it?

6 A. Reference and research cigarettes, that's
7 correct.

8 Q. It did in vitro testing in the United
9 States and in Richmond?

10 A. In the United States and in Richmond?

11 Q. I mean in the United States in Richmond.

12 A. Yes.

13 Q. And it did in vivo testing at INBIFO?

14 A. It did.

15 Q. And it did all kinds of tests on reference
16 cigarettes, didn't it?

17 A. On reference cigarettes, it did.
18 Q. Now, these reference cigarettes are
19 cigarettes, aren't they?
20 A. Yes.
21 Q. They look like this?
22 A. Well, they can look like that.
23 Q. There are reference cigarettes which look
24 like this?
25 A. Yes.
26 Q. The reference cigarettes are tubular?
27 A. Yes.
28 Q. They have tobacco in them?

2397

1 A. That's correct.
2 Q. They have filters on them?
3 A. Yes.
4 Q. They have reference cigarettes with very
5 little tar and nicotine, right?
6 A. Well, they have reference cigarettes that
7 are constructed so they will deliver very low tar and
8 nicotine, yes.
9 Q. And they have reference cigarettes that
10 will deliver very high levels of tar and nicotine?
11 A. Well, there are three basic reference
12 cigarettes, I think, but yes.
13 Q. They have reference cigarettes that have
14 different kinds of filters on them?
15 A. That's correct.
16 Q. And they have reference cigarettes that
17 have flavorings in them, don't they?
18 A. Yes.
19 Q. And they have reference cigarettes that
20 don't have flavorings in them?
21 A. That's correct.
22 Q. And Philip Morris has tested these
23 reference cigarettes over the years, as has every other
24 tobacco company in the United States and probably in the
25 world, right?
26 A. That's correct.
27 Q. And these reference cigarettes have been
28 tested by independent scientific laboratories too?

2398

1 A. Yes. They are used as calibrations in the
2 test, that's correct.
3 Q. Reference cigarettes were not invented by
4 tobacco companies?
5 A. That's correct.
6 Q. They were developed under the auspices of
7 the University of Kentucky, right?
8 A. That's correct.
9 Q. And the National Cancer Institute was
10 involved in the development of reference cigarettes,
11 wasn't it?
12 A. Yes. You need to have a reference in your
13 test.
14 Q. When you smoke a reference cigarette, you
15 get nitrosamines, right?
16 A. Different levels than commercial
17 cigarettes, but yes, that's correct.
18 Q. You get different levels of nitrosamines
19 in different kinds of reference cigarettes, don't you?
20 A. That's true too.
21 Q. You get aldehydes when you smoke reference

22 cigarettes?
23 A. Again, at different levels, that's true.
24 Q. Do you get polycyclic aromatic
25 hydrocarbons when you smoke reference cigarettes?
26 A. That's true.
27 Q. All of the bad things there are in tobacco
28 are in reference cigarettes in one form or another,

2399

1 aren't they?
2 A. Yes.
3 Q. All over the world, scientists, including
4 scientists having no connection to the tobacco industry,
5 have studied reference cigarettes and tested them,
6 haven't they.
7 A. Yes. As part of their testing of other
8 cigarettes, you need to have a reference.
9 Q. Now let's talk a little bit about, just a
10 little bit, about some of the biological testing that
11 Philip Morris did.
12 Philip Morris conducted mouse skin
13 painting using cigarettes, right?
14 A. Using what kind of cigarette? I'm not
15 sure.
16 Q. Mouse skin painting tests using
17 cigarettes?
18 A. Okay. I agree with that, yes.
19 Q. They did mouse skin painting tests with
20 reference cigarettes?
21 A. Yes, they did.
22 Q. They conducted rat ingestion tests using
23 all kinds of cigarettes, didn't they?
24 A. I'm not sure what you mean by that, about
25 "all kinds."
26 Q. Philip Morris did rat ingestion tests on
27 reference cigarettes, on whole product cigarettes as
28 marketed?

2400

1 A. Rat ingestion tests?
2 Q. Yes.
3 A. I'm not familiar with that.
4 Q. You are not familiar with the tests or you
5 are not familiar with rat ingestion?
6 A. I am not familiar with which tests you are
7 referring to, because that's not -- eating cigarettes is
8 not one of the things that I recall as being a test that
9 has to do with the toxicology of inhaled smoke.
10 Q. When I was talking about ingestion, I
11 meant inhaling.
12 A. Oh, I'm sorry. Okay. I thought -- that
13 was confusing to me.
14 Q. They did such tests, didn't they?
15 A. They did.
16 Q. They did cell toxicity tests?
17 A. Yes.
18 Q. They did inhalation toxicity tests?
19 A. On reference cigarettes and prototypes and
20 experimental cigarettes.
21 Q. And they may have done it on whole
22 products, commercial products, too, right?
23 A. They may have.
24 Q. You are not sure?
25 A. That's correct.
26 Q. And they did in vitro cell tests, right?

27 A. Yes.
28 Q. Now, Philip Morris also had tests done by
1 contract laboratories, correct?
2 A. That's true.
3 Q. And there's nothing wrong with having
4 tests done by contract laboratories, is there?
5 A. No.
6 Q. One of the laboratories Philip Morris used
7 to do such tests on its cigarettes was Hazelton
8 Labs?
9 A. That's correct.
10 Q. A very highly respected, fine research and
11 testing laboratory, right?
12 A. That's correct.
13 Q. One that you used when you were at Lever
14 Brothers?
15 A. That's correct also.
16 Q. I want to ask you a question about the
17 so-called gentlemen's agreement. This gentlemen's
18 agreement that you talked about supposedly prohibited
19 biological tests on commercial brands as marketed brands
20 of cigarettes on animals at the companies in the United
21 States, right?
22 A. That's the best of my recollection, yes.
23 Q. It did not prevent or prohibit tests other
24 than biological tests, right?
25 A. Like tar determinations. Chemical tests
26 were okay.
27 Q. Chemistry tests?
28 A. Yes.

2401

1 Q. It did not prevent or prohibit tests on
2 reference cigarettes or research cigarettes, right?
3 A. That's correct.
4 Q. It did not prevent tests that weren't done
5 on animals, live animals, live whole animals I think you
6 said?
7 A. Live animals, parts of whole animals or
8 parts of live animals, I think has a meaning. So if I
9 said that, I misspoke.
10 Q. This agreement did not prevent tests being
11 done on anything other than live animals?
12 A. That's correct.
13 Q. It didn't prevent research being done by
14 contract laboratories, only research at the companies,
15 right?
16 A. I'm not sure. I think -- the contract
17 laboratory was in the United States. I think that still
18 posed a problem, the way I understood it.
19 Q. Although, you have acknowledged that
20 Philip Morris, in fact, did do biological research at
21 contract laboratories in the United States?
22 A. That's correct.
23 Q. And it was only limited to the United
24 States?
25 A. Yes.
26 Q. So anyone could do smoke chemistry tests?
27 They could do any test including biological tests on
28 commercial -- on non-commercial brands. They could do
1 any test they wanted to anywhere as long as it wasn't on
2 live animals. They could do any tests they wanted to as

2402

1 any test they wanted to anywhere as long as it wasn't on
2 live animals. They could do any tests they wanted to as

2403

3 long as it wasn't in the United States, right?
4 A. That's correct.
5 Q. By the way, biological testing is not the
6 only testing of the safety of cigarettes that's
7 important, is it?
8 A. No. Chemical testing is probably even
9 more important.
10 Q. And Philip Morris did lots of that?
11 A. Yes, they did.
12 Q. And smoke chemistry. You are talking
13 about smoke chemistry tests?
14 A. Well, the carcinogens. Once you know you
15 have carcinogens, then measuring them and seeing how
16 they change in your products is an important part of
17 testing.
18 Q. And we also know that Philip Morris did do
19 biological testing, all the biological tests that you
20 have been talking about, on reference cigarettes, right?
21 A. Yes.
22 Q. And we also know that even if there was
23 such an oddly constructed agreement, Philip Morris was
24 breaking that agreement all the time, wasn't it?
25 A. That's what I was told.
26 Q. And, in fact, Philip Morris was breaking
27 that agreement all the time with the specific intent --
28 hope, intent of developing a safe cigarette so that it

2404

1 could take over the whole market; isn't that correct?
2 A. That could be one explanation. The other
3 explanation I was told --
4 Q. You were told that, weren't you?
5 A. That was one of the two things I was told.
6 Q. You were told that Philip Morris was
7 breaking this so-called agreement all the time in the
8 hopes of developing a safe cigarette and taking over the
9 whole market?
10 A. That was one thing I was told, yes.
11 Q. And, in fact, if Philip Morris had been
12 the first company to develop a truly safe cigarette, it
13 could have made billions and billions of dollars,
14 couldn't it?
15 A. I'm not sure I follow that.
16 Q. If Philip Morris were the first company to
17 develop a truly safe cigarette, it could make a whole
18 lot of money, couldn't it?
19 A. More so than it's making today --
20 Q. Even more so than it's making now.
21 A. I'm not sure of that.
22 Q. Everybody else would be making a cigarette
23 that wasn't safe and only Philip Morris would have one
24 that was safe?
25 A. Well, I'm afraid it doesn't work that way.
26 Q. I want you to assume for the moment that
27 Philip Morris developed a truly safe cigarette by
28 breaking the gentlemen's agreement all the time and by

2405

1 pursuing these projects that we have been talking about
2 here.
3 A. Okay.
4 Q. And nobody else had a product that was
5 truly safe. Philip Morris would have made a whole lot
6 of money, wouldn't it?
7 A. I don't think so. That cigarette most

8 likely would have required regulation. The cost would
9 have been higher. They would have to negotiate with the
10 Food and Drug Administration. There's a lot of reasons
11 why they might not have made any more money and might
12 have actually gone out of business.

13 Q. Is that right?

14 A. Yes.

15 Q. How do you know that?

16 A. Because that's what was discussed when I
17 was there.

18 Q. That's what people told you. "We are
19 going to put \$300 million into the denicotinized
20 cigarette plant. We are going to put billions of
21 dollars into the development of a cigarette like the
22 Accord that heats instead of burning tobacco. We are
23 going to hire 600 scientists to work on projects like
24 NOD and crystallization and reduction in tar; and we are
25 doing it all and it's all a fraud."

26 That's what you are telling the jury,
27 right?

28 A. No. I didn't say it was all a fraud. The

2406

1 people -- I have already testified that the science was
2 great, the work was good, people's heart was in the
3 right place. The question is the implementation, the
4 lack of significant progress for 50 years, given all
5 those expenditures.

6 Q. What you are telling the jury is that all
7 of this effort was being made, but that Philip Morris
8 wasn't doing it because they thought they could make a
9 lot money if they developed the first safe cigarette?

10 A. I don't understand that. They weren't
11 doing it because they didn't want to risk their existing
12 business, Marlboro.

13 Q. They were doing it, weren't they?

14 A. They did not introduce any of those things
15 in Marlboro. They would not risk the Marlboro
16 franchise.

17 Q. They did introduce many product
18 improvements that you have yourself praised as
19 worthwhile, did they not?

20 A. They did.

21 Q. They introduced a denicotinized cigarette,
22 a cigarette with little or no nicotine, right?

23 A. They absolutely did that, right.

24 Q. And they have put billions of dollars into
25 the development of a cigarette that heats instead of
burns, right?

27 A. And they haven't marketed it.

28 Q. They are marketing it.

2407

1 A. Okay. That's --

2 Q. Aren't they?

3 A. Well, it's in test markets. It has not
4 been available commercially to people even though it's
5 been around for five years.

6 Q. So you are criticizing Philip Morris for
7 not marketing this product sooner, right?

8 A. Yes. Recall the Marlboro and replace the
9 existing product. If it's actually believed by Philip
10 Morris to be less hazardous, on what justification do
11 they continue to sell Marlboro? You recall Marlboro and
12 replace Marlboro in the market.

13 Q. I didn't ask you about Marlboro, Doctor.
14 I asked you about Accord.

15 A. Okay.

16 Q. The fact of the matter is they have spent
17 billions and billions of dollars on all of this
18 research, much of which you have praised as being a good
19 idea, but they didn't do it because they wanted to make
20 money. Is that your testimony? Is it or is it not?

21 A. I'm not sure I understand the question.
22 They didn't do it because they wanted to make money.
23 They are making money. They didn't do it because they
24 didn't want to lose money, is the way I'd say it.

25 Q. Okay. Let's move on.

26 Urea. You said it converts to ammonia,
27 right?

28 A. That's correct.

2408

1 Q. Which increases something called the pH?

2 A. Well, it can. It doesn't necessarily have
3 to.

4 Q. It can increase the pH?

5 A. Yes.

6 Q. I want to ask you a couple of questions
7 about nicotine in cigarettes.

8 Which -- pardon me. Go back for a
9 second -- which can result in increase in free nicotine,
10 right?

11 A. Yes.

12 Q. Okay. Nicotine occurs naturally in
13 tobacco, right?

14 A. Not all tobacco but most tobacco, yes.

15 Q. When tobacco comes into the plant, it
16 contains nicotine, doesn't it?

17 A. It does.

18 Q. And in the process of manufacturing
19 cigarettes, there is some nicotine that's actually lost,
20 isn't there?

21 A. Yes, there is.

22 Q. So that when it goes through the
23 manufacturing process, there's actually less nicotine
24 than there was when it was tobacco out in the field,
25 isn't there?

26 A. That's true, yes.

27 Q. And PM does not add nicotine to its
28 cigarettes, does it?

2409

1 A. Generally speaking, that's correct.

2 Q. It doesn't spike its cigarettes with
3 nicotine, does it?

4 A. No. At worst they use flavorants that
5 contain nicotine, tobacco extracts, but it's not
6 spiking.

7 Q. In fact, you have told the FDA yourself
8 that Philip Morris -- you have defended Philip Morris
9 and said, "We do not spike nicotine -- our cigarettes
10 with nicotine," right?

11 A. I have, that's correct.

12 Q. But you have advocated actually adding
13 nicotine to cigarettes, haven't you?

14 A. I have advocated taking out all the tars
15 and providing the smoker with the addictive drug that
16 they need. So if we put nicotine into a Cambridge with
17 zero tar and we gave them nicotine, they would smoke the

18 product, the addiction would be allowed, as it's legal,
19 and they wouldn't get cancer.

20 Q. But, as we've discussed previously, there
21 are scientists who don't think that's a very good idea,
22 aren't there?

23 A. I don't know of any scientist who thinks
24 it's a good idea for people to get cancer.

25 Q. Did I ask you whether any scientists
26 thought it was a good idea to get cancer? Is that the
27 question I asked you?

28 A. That's the question that I heard because

2410

1 we are talking about the thing that I explained, which
2 is adding nicotine so people won't get cancer.

3 If you are saying that scientists think
4 that adding nicotine isn't a good thing, they are
5 talking about cigarettes that still have the potential
6 of giving cancer. That's all I'm trying to say.

7 Q. How about answering the question I asked
8 you.

9 A. Try again. I'm sorry.

10 Q. There are scientists who do not agree that
11 it would be a good thing to add nicotine to cigarettes?

12 A. To normal cigarettes, that's correct.

13 Q. Including Dr. Benowitz?

14 A. Correct. To normal cigarettes, I agree.

15 Q. In fact, you have advocated intentionally
16 increasing the pH, haven't you?

17 A. Up to the point where it cannot be inhaled.

18 Q. So that you couldn't inhale at all?

19 A. That's right.

20 Q. Then it would be safe because nobody would
21 be smoking?

22 A. No, no. I smoke a pipe and cigars. You
23 can still smoke, but it doesn't get in your lungs, so
24 you don't get lung cancer.

25 Q. Ammonia occurs naturally in nicotine too,
26 doesn't it?

27 A. In tobacco.

28 Q. I mean in tobacco.

2411

1 A. Yes, it does.

2 Q. All right. Finally, let's talk about
3 Cambridge.

4 Are you telling this jury that the
5 Cambridge cigarette that registered 0.0 on the FTC scale
6 was a safe cigarette?

7 A. No, I didn't say that, because people
8 compensate. They can get more tar out of it than 0.0.
9 It's safer.

10 Q. Are you telling the jury that it has been
11 demonstrated scientifically, that is, to a reasonable
12 degree of scientific probability, that the Cambridge
13 with 0.0 was safer?

14 A. Can't quite make that determination yet.

15 Q. Nevertheless, you meant to imply -- to
16 criticize Philip Morris for removing the 0.0 Cambridge
17 from the market, didn't you?

18 A. I didn't imply it. I stated flat-out that
19 once you have a cigarette that is that safe or safer,
20 then keeping the other cigarettes there when you could
21 make this one acceptable seems like the wrong thing to
22 do.

23 Q. Even though you had nothing to do with and
24 have no personal knowledge of the reasons for taking
25 Cambridge off the market because you were already gone
26 from the company, right?

27 A. No, that's not right.

28 Q. Were you already gone from the company

2412

1 when it was taken off the market?

2 A. That's true, but you said --

3 Q. Were you involved in the decision to take
4 it off the market?

5 A. Oh, I see what you mean. No, I wasn't.

6 Q. So you have no personal knowledge of the
7 reasons for taking it off the market, do you?

8 A. That's what I was told when I was there.

9 Q. How could you be told when you were there
10 when it hadn't been taken off the market yet?

11 A. Because the plan was to not continue to
12 market it.

13 Q. I see. So you were told that the company
14 was going to take it off the market. And the reasons it
15 was going to take it off the market?

16 A. Because it was judged to be something to
17 advertise during the period of time it was on the
18 market, and people understand it to be the lowest tar;
19 and then you increase the tar, and people still think
20 it's the lowest tar. That's what I was told.

21 Q. Ahh, I see. This was all a big fraud.
22 This was all a big fraud. The idea was you are going to
23 fool people into thinking that this product is safe and
24 then you are going to slip some tar into it after that.
25 That was the plan?

26 A. That was the plan.

27 Q. And you were told that by Philip Morris?

28 A. Yeah. I sat at a meeting where it was

2413

1 discussed.

2 Q. You sat at a meeting where it was
3 discussed, and people told you this and you said, "This
4 is outrageous. I'm going to leave this company
5 tomorrow"?

6 A. No. I asked the --

7 Q. Did you?

8 A. No, I did not. I asked a question about
9 it at the meeting as to whether or not that was a
10 legally allowable thing to do, and I received an answer
11 from the general counsel.

12 Q. Did you write any memos to anyone, general
13 counsel or anyone else, saying, "This is an outrage that
14 we are going to try to pull this fraud on the American
15 people"?

16 A. Not after I heard his explanation.

17 Q. Did you write any memos at any time
18 complaining about this fraud scheme?

19 A. No.

20 Q. Now, the fact is that the 0.0 tar
21 Cambridge was marketed all over the United States,
22 wasn't it?

23 A. It was.

24 Q. It was supported by a multimillion dollar
25 advertising campaign and was heavily promoted?

26 A. It was, yes.

27 Q. It was supported -- in fact, it was the

28 most expensively promoted new product ever marketed in

2414

1 the tobacco industry at the time, wasn't it?

2 A. I'm not sure of that.

3 Q. You heard that, didn't you?

4 A. Well, I read about it subsequently. At
5 the time I'm not sure I was aware of that.

6 Q. You have testified, "I don't doubt it,"
7 haven't you?

8 A. Well, that's true. I don't doubt it, but
9 it's a different question.

10 Q. Retailers were given special cash
11 allowances to displace the cigarettes in prominent
12 positions and near the cash register; isn't that right?

13 A. That's correct.

14 Q. Multimillion dollar coupon programs were
15 put into place to help and try to sell this Cambridge
16 product?

17 A. They advertised it as being the lowest.

18 Q. Is the answer to my question yes?

19 A. Yes.

20 Q. It was advertised as the lowest tar
21 cigarette ever?

22 A. Yes.

23 Q. Now, it was no secret that Philip Morris
24 came out with this 0.0 Cambridge, was it?

25 A. No.

26 Q. As a matter of fact, just to remind the
27 jury from yesterday, although it registered 0.0 on the
28 FTC machine, it did have tar, didn't it? It did produce

2415

1 some tar, didn't it?

2 A. I'm not sure what you mean by that. Under
3 the FTC test --

4 Q. I know what it said under the FTC test.
5 I'm asking you whether, in fact, there was some tar?

6 A. Oh, when people smoked it, you mean?

7 Q. Yes.

8 A. Because of compensation, of course, yes.

9 Q. And because of the gas?

10 A. Gas isn't tar. That's separate; but there
11 was chemicals in the gas phase that still could pose a
12 risk, which is why you can't say that it's safe.

13 Q. Now, the year -- why you can't say that
14 it's safe?

15 A. Yes.

16 Q. Or even safer?

17 A. No, you can say it's safer.

18 Q. Without proof?

19 A. The proof is in the chemistry; and the
20 chemistry, those cigarettes, the standards I was talking
21 about yesterday, have allowable doses of carcinogens.
22 The Cambridge cigarette was below the levels. The
23 problem is we don't know them all.

24 Q. We are talking about 1980, Doctor.

25 A. Yeah. We know what acetaldehyde content
26 of the Cambridge cigarette was on that test. We know
27 what the arsenic content was; and what I'm saying is at
28 those times, the doses that we had to get down to, that

2416

1 was in the vicinity of numbers that were so low that
2 they were within the bounds of background, like you
3 would find in this room.

4 Q. Now, the year after the Cambridge 0.0 tar
5 cigarette came out, the Surgeon General of the United
6 States issued a report called "The Changing Cigarette";
7 isn't that right?

8 A. That's correct.

9 Q. And one of the principal questions that
10 was discussed in this document was whether or not design
11 changes that had been made to cigarettes, particularly
12 reductions in tar, had made a difference with respect to
13 the health risks of smoking?

14 A. That is correct.

15 Q. That's what that report was all about,
16 wasn't it?

17 A. Yes.

18 Q. The Surgeon General did not say in that
19 report that Cambridge was a safe cigarette, did it?

20 A. No, he did not.

21 Q. He didn't say in that report that it was a
22 safer cigarette, did he?

23 A. I think what the Surgeon General --

24 Q. The question calls for a yes or no
25 answer. Did he say that it was a safer cigarette or
26 didn't he?

27 A. No, he did not.

28 Q. The Surgeon General did not call a press

2417

1 conference to announce that Philip Morris had come out
2 with this 0.0 Cambridge product and it is safer, did he?

3 A. I think the -- well, no, he didn't.

4 Q. In fact, the Surgeon General came to the
5 opposite conclusion in that report, didn't he?

6 A. I don't think Cambridge is discussed in
7 the report.

8 Q. The conclusion, the number one, the most
9 important conclusion of the Surgeon General's report
10 issued one year after Cambridge came on the market is
11 that there is no safe cigarette and no safe level of
12 consumption; isn't that right?

13 A. Absolutely safe. That's correct, yes.

14 Q. No public health organization then or at
15 any time during the years that Cambridge was on the
16 market ever endorsed Cambridge as either safe or safer,
17 did they?

18 A. That is correct.

19 Q. Now, when the Cambridge product was
20 developed, the plan Philip Morris had was to market a
21 family of Cambridge products, right?

22 A. That's correct.

23 Q. One, the one we have been talking about,
24 was to have by the FTC method 0.0?

25 A. That's correct.

26 Q. The other two were going to have higher or
27 more flavor, right?

28 A. Higher tar. About 2 and about 4.

2418

1 Q. Still pretty low by comparison to what was
2 on the market at the time?

3 A. That is correct.

4 Q. Ventilation was the principal technique
5 used to develop the Cambridge cigarette, wasn't it?

6 A. It was.

7 Q. And was a major accomplishment by Philip
8 Morris to do this, wasn't it?

9 A. It was.
10 Q. Okay. So they put three different
11 Cambridge brands on the market; one of which had close
12 to zero, one of which had 2, and one of which had 4.
13 The Cambridge product had a lot of
14 problems in the marketplace, didn't it?
15 A. It had some problems, yes.
16 Q. One of the problems was that it was so
17 difficult to light, that Philip Morris had to provide
18 instructions on how to light it?
19 A. Excellent idea, yes.
20 Q. Another problem was people didn't like it?
21 A. Didn't like which?
22 Q. The Cambridge, the 0.0 tar Cambridge
23 cigarette, people didn't like it?
24 A. People didn't like it as much as other
25 cigarettes, but I mean, people bought it and smoked it.
26 Q. They didn't buy much, did they?
27 A. Well, I don't have the sales statistics.
28 Q. You know that Philip Morris had the

2419

1 Cambridge 0.0 product on the market for six years and it
2 never succeeded in the marketplace, did it?
3 A. I'm not sure of that, but I will accept it.
4 Q. By the way, marketing families of products
5 is not uncommon in the consumer products business, is it?
6 Using a brand name but having two or three different --
7 A. No, it's not uncommon in some kinds of --
8 like detergent, soap bars, things like that. Sometimes
9 you have the same name on a soap bar and you have it on
10 a detergent.
11 Q. Now, between 1980 and 1986 when the
12 Cambridge product was being marketed, there was no
13 increase in the tar level of the lowest packaging of
14 Cambridge, was there?
15 A. Of the 0.0, that's correct.
16 Q. And when you left Philip Morris and the
17 0.0 Cambridge was still on market, there was still a
18 Cambridge that delivered 4 milligrams of tar, right?
19 A. That's correct.
20 Q. And there was another Cambridge on the
21 market that developed -- delivered 0.1 milligrams of
22 tar?
23 A. I lost you on the time line. I'm sorry.
24 Q. When you left -- when you left Philip
25 Morris, Philip Morris was still selling Cambridge
brands?
27 A. Oh, yes. Oh, yes. I'm sorry. Yes.
28 Q. With what, by comparison for the time,

2420

1 were very low amounts of tar?
2 A. That is correct.
3 Q. Now, later Cambridge was repositioned as a
4 higher tar cigarette, wasn't it?
5 A. Well, yes.
6 Q. And when it was, that wasn't hidden from
7 the public, was it?
8 A. No. There were three brands that were
9 repositioned.
10 Q. The tar yields of those cigarettes were
11 all printed in the cigarette advertisements?
12 A. Yes.
13 Q. The new repositioned Cambridge came in a

14 different box?
15 A. Yes. But they kept one of the old ones on
16 the market.
17 Q. Yes.
18 A. Okay.
19 Q. They advertised the new Cambridge as "The
20 New Cambridge," right?
21 A. Yes. But again, we have the -- one of the
22 old Cambridges hanging over there.
23 Q. They no longer advertised any of the
24 Cambridge brands as being the lowest tar ever; isn't
25 that correct?
26 A. That is correct.
27 Q. It was made into a generic brand of
28 cigarettes?

2421

1 A. That's correct.
2 Q. The generic brand had a 1 milligram tar
3 cigarette, right?
4 A. Well, there was a 16, a 12, and I think
5 the lowest one was 2, but. . .
6 Q. You don't think they had a 1 milligram?
7 A. Well, not at that time. In '86 I think it
8 was 1 to 2, because numbers that I have seen off of the
9 Philip Morris cigarette information reports, which I'm
10 trying to recall, I think it's between 1 and 2, but
11 let's not quibble.
12 Q. Now, the Philip Morris Merit brand of
13 cigarettes which was on the market at the time, also had
14 a 1 milligram cigarette, didn't it?
15 A. Yes, it did.
16 Q. It was called Merit Ultima?
17 A. Or Ultra Lights, yes.
18 Q. And the Merit Ultima is still on the
19 market today, right?
20 A. I believe so, yes.
21 Q. It's heavily promoted?
22 A. Yes.
23 Q. Highly advertised?
24 A. Yes.
25 Q. One milligram of tar. It was a good thing
26 for Philip Morris to be putting a cigarette with one
27 milligram of tar on the market and promoting it, wasn't
28 it.

2422

1 A. It's a good thing; take off the other
2 ones, especially.
3 Q. It was a good thing for Philip Morris to
4 make and sell and promote a 1 milligram tar cigarette,
5 wasn't it?
6 A. Yes, uh-huh, it was.
7 Q. And the Merit Ultima has been a success in
8 the marketplace, hasn't it?
9 A. I'm not sure. I don't have the sales
10 numbers.
11 Q. Now, let's talk for a moment about just
12 how safe you think this cigarette is, this Cambridge.
13 This is not a Cambridge. This is a Benson & Hedges.
14 This is the filter right here, right --
15 A. Right.
16 Q. -- on this cigarette?
17 This is where you light it right here,
18 right?

19 A. Okay. Yes.
20 Q. And when you light that cigarette, you
21 take some of it in through the lung when you smoke it,
22 right?
23 A. You can, yes.
24 Q. And you have some that comes out of the
25 tip of the cigarette?
26 A. Correct.
27 Q. That's called sidestream smoke, right?
28 A. That's correct.

2423

1 Q. You described -- you use sidestream smoke
2 or environmental tobacco smoke or any one of a number of
3 other terms to describe that which lingers around the
4 end of the cigarette?

5 A. Well, it goes out into the room. It
6 disperses into the room.

7 Q. It disperses into the room, but it
8 contains dangerous carcinogenic chemicals, does it not?

9 A. It certainly does.

10 Q. Like carbon monoxide?

11 A. Well, that's not carcinogenic. It's just
12 a dangerous chemical.

13 Q. Benzo-pyrene?

14 A. Yes.

15 Q. Nitrosamines?

16 A. Yes.

17 Q. All the bad stuff we have been talking
18 about?

19 A. Yes.

20 Q. In fact, if you look through the published
21 literature, you would find that all or virtually all of
22 the dangerous compounds or constituents found in tobacco
23 smoke appear in sidestream smoke too?

24 A. That is correct.

25 Q. And sidestream smoke is dangerous, isn't
26 it?

27 A. Yes. About 10 percent of the risk of
28 smoking a cigarette.

2424

1 Q. It's dangerous to the smoker?

2 A. It's dangerous to everybody.

3 Q. But it's specifically dangerous to the
4 smoker?

5 A. Yes.

6 Q. It's dangerous to other people too?

7 A. Correct.

8 Q. So dangerous that the State of California,
9 for example, basically has barred smoking in public
10 places to keep other people from getting it?

11 A. That's correct.

12 Q. But it's dangerous to smokers too, isn't
13 it?

14 A. That is correct.

15 Q. In fact, you have testified, have you not,
16 that smokers are the ones most susceptible to sidestream
17 smoke and that a considerable amount of their exposure
18 comes from sidestream smoke and not mainstream smoke?

19 A. About 20 percent, that's correct.

20 Q. In fact, you have said that smokers are
21 literally bathing in sidestream smoke?

22 A. That's right. It still has reduced risk,
23 but they are.

24 Q. You have said that they get an extra dose
25 of the bad chemicals from it?
26 A. Yes, about 20 percent extra.
27 Q. In fact, you have testified that the
28 sidestream smoke from cigarettes poses a significant

2425

1 risk to cigarette smokers?
2 A. That's right. It's only reduced by about
3 80 percent.

4 Q. And so the Cambridge 0.0 cigarette had
5 sidestream smoke, didn't it?

6 A. That's correct. It would only save
7 80 percent of the lives.

8 Q. But it would kill 20 percent?

9 A. That's right. Still unacceptable, but
10 80 percent safer.

11 Q. Now, what does all this have to do with
12 the plaintiff in this case?

13 A. Pardon me?

14 Q. What does it have to do with the plaintiff
15 in this case?

16 A. You're asking me?

17 Q. Yes.

18 A. In my opinion, Philip Morris could have
19 provided the plaintiff with a product that would not
20 have caused her cancer.

21 Q. Mrs. Bullock was smoking cigarettes in
22 1980 to 1986 when the Cambridge 0.0 product was on the
23 market. Do you have any reason to believe she ever
24 tried it?

25 A. No. I have reason to believe Philip
26 Morris should have been out of the business by then.

27 MR. BLEAKLEY: I move to strike the answer as
28 argumentative and non-responsive.

2426

1 THE COURT: The answer will be stricken as
2 non-responsive. That portion of the answer "Do you have
3 any reason to believe they tried it or she ever tried
4 it," the answer is "no" --

5 THE WITNESS: "No."

6 THE COURT: -- may stand. Everything thereafter
7 is stricken.

8 BY MR. BLEAKLEY:

9 Q. The Cambridge 0.0 product was on the
10 market, heavily promoted and heavily advertised, but
11 Mrs. Bullock never tried it, did she?

12 A. I don't know.

13 Q. You have been told that she smoked
14 Benson & Hedges 100s for --

15 THE COURT: What he has been told is hearsay;
16 and so you may ask questions of his knowledge but not
17 what he has been told.

18 BY MR. BLEAKLEY:

19 Q. Do you have any knowledge that
20 Mrs. Bullock ever tried Carlton?

21 A. No, I don't.

22 Q. Do you have any knowledge that she ever
23 tried Merit?

24 A. No, I do not.

25 Q. Do you have -- do you have knowledge that
26 she ever tried any of the lower tar brands of cigarettes?

27 A. I have no knowledge one way or the other.

28 Q. Do you have any knowledge of whether she

1 ever tried the low-tar version of Benson & Hedges?

2 A. No, I do not.

3 THE COURT: Is this a good time for a break,
4 Counsel?

5 MR. BLEAKLEY: I am just about finished. I will
6 wait. I will have a few minutes at lunchtime to see if
7 there's something else.

8 (Laughter.)

9 MR. BLEAKLEY: Once I heard the "um-hum" --

10 THE COURT: The left hand giveth and the right
11 hand taketh away.

12 Ladies and gentlemen, once again, I would
13 admonish you not to discuss this case amongst yourselves
14 or with anyone else. Do not form or express any opinion
15 on the matter until it's finally submitted to you.

16 1:30, please.

17

18 (A discussion was held between the
19 court and counsel, not reported.)

20

21 (The noon recess was taken until
22 1:30 p.m. of the same day.)

23

24

25

26

27

28

1 Los Angeles, California September 4, 2002

2 Case Number: BC249171

3 Case Name: Bullock vs. Philip Morris

4 Department 19 Hon. Warren L. Ettinger, Judge

5 Reporter: Ruanne McArthur, CRR, CSR #2699

6 Time: 1:30 p.m. Session

7 Appearances: (As heretofore noted.)

8 -oOo-

9 (The following proceedings were held
10 in open court within the presence of
11 the jury:)

12

13 MR. PIUZE: Your Honor, before we start, can we
14 take another 20 seconds of your time here, 20 seconds?
15 I will commit myself and my client.

16

17 (A discussion was held at the bench,
18 not reported.)

19

20 (The following proceedings were held
21 in open court within the presence of
22 the jury:)

23

24 THE COURT: The record will reflect that the
25 jury is present and in the box.

26 Let me tell you what we have been doing
27 and what we are doing.

28 One of the real problems in this case, as

1 I suppose in most cases, but this one in particular, we
2 have three witnesses from out of the jurisdiction who
3 have flown in to testify, and one of them needs to be
4 back on the East Coast Friday. So we are going to take

5 advantage of him by not calling him until Friday has
6 passed, and he can go back East and take care of his
7 business.

8 Another witness has flown in from Buffalo,
9 and we are going to try to have his testimony tomorrow;
10 and then we have still a third witness, and I don't know
11 what we are going to do with him, but we are going to do
12 something.

13 And then we, in all likelihood, on Friday,
14 will have a video deposition of the plaintiff, and so we
15 need to deal with some of these things; and then there
16 are legal issues.

17 Because we have done this juggling, it
18 would have been nice if we would have had the
19 opportunity -- if I would have had the opportunity of
20 evaluating the legal issues so that I could make rulings
21 on them and we would know where we are going; but we
22 couldn't do that simply because nobody knew who was
23 going to be when.

24 So what we are going to do today is we
25 will go as far as we can with this witness and we will
26 finish with him. He will be done; and then it may very
27 well be that I am going to have to meet with the lawyers
28 and hammer out where we are going; and I will do so as

2430

1 long as I can do it and get a feeling for whether -- if
2 we are going to finish in time to have more testimony
3 that you can hear, we will do it.

4 If it appears that it is going to be
5 elongated, there's no reason for you to have to sit here
6 and look at each other and get even more angry at me;
7 and that way, if you are angry, you can be outside and
8 beat up on your relatives instead of me.

9 (Laughter.)

10 THE COURT: So you may get sent home early. So
11 I just don't know the answer to that yet, but that's the
12 problem.

13 It just seems to me very difficult, but I
14 should know the answer to that in about five minutes;
15 that I'll either be able to say, "Yeah, we'll just go.
16 Make your objections. I am going to rule on them and so
17 forth."

18 But I am going to let the -- let's see,
19 have we finished cross-examination?

20 MR. BLEAKLEY: Not quite.

21 THE COURT: When you finish cross-examination, I
22 am going to read the jury a jury instruction, but I want
23 cross-examination to be over.

24 MR. BLEAKLEY: Thank you, your Honor.

25 THE COURT: You're welcome.

26 MR. BLEAKLEY: Good afternoon, everyone.

27 (All respond.)

28 MR. BLEAKLEY: We all apologize for the delay.

2431

1 It's sort of inevitable in these cases.

2

3 CROSS-EXAMINAITON (Continued)

4

5 BY MR. BLEAKELY:

6 Q. I just have a few more questions for you,
7 Dr. Farone. I want to ask you a couple more questions
8 about this Cambridge cigarette and in particular this
9 fraud scheme that you testified about. I want to make

10 sure we all understand what it is you are saying here.
11 As I understand it, you are saying that
12 back when this was called Project Trinity, a group of
13 you were sitting around the table and a proposal was
14 made to bring the Cambridge 0.0 tar cigarette out on the
15 market and promote it and sell it and get people buying
16 it and make millions of dollars in revenue.

17 And then after it was a big success in the
18 marketplace, Philip Morris was going to -- without
19 telling anyone, was going to increase the amount of tar
20 in the cigarette, right?

21 A. No.

22 Q. Well, then you tell us what it was,
23 because I don't understand. What was the fraud here?

24 MR. PIUZE: Excuse me. Assumes facts not in
25 evidence. This witness I don't ever think used that
26 term.

27 THE COURT: The objection is assumes facts not
28 in evidence?

2432

1 MR. PIUZE: Right. No foundation.

2 THE COURT: Sustained. Now, rephrase your
3 question.

4 BY MR. BLEAKLEY:

5 Q. Is it your opinion that the plan that
6 Philip Morris had for the Cambridge 0.0 cigarette was
7 intended to defraud the American public?

8 A. I don't know the definition of fraud in
9 that. It intended to mislead.

10 Q. All right. You tell us how it is that
11 Philip Morris was going to mislead the American public
12 with this cigarette.

13 A. With this cigarette and others. The basic
14 idea is that you introduce a product that has very low
15 tar, you advertise it as being the lowest or low, and
16 then you know or you have good reason to believe that it
17 will not be successful; but after five years of
18 advertising it as being the lowest or in other cases as
19 being 1 milligram or whatever other things they wanted
20 to do for other names of cigarettes that I could go
21 into, they then increased the tar.

22 And I don't see any reason whatsoever for
23 increasing the tar in a cigarette, which we know to be
24 more hazardous by anybody's measure, once you have
25 established a tar level.

26 Q. So what was misleading?

27 A. Well, it just isn't Cambridge. It's
28 several different cigarettes.

2433

1 Q. I am only asking about Cambridge, Doctor.

2 A. The misleading is to advertise for five
3 years that this is the lowest, even though at the end of
4 that time you change. The documents clearly show that
5 they were building on the Cambridge name; in other
6 words, people had seen this thing being advertised as
7 the lowest for five years, and now all of a sudden, it
8 isn't the lowest anymore. That's wrong, in my opinion.

9 Q. And this was done intentionally to mislead
10 people, in your opinion?

11 A. It was done several times, yes.

12 Q. I am asking you only about Cambridge,
13 Dr. Farone.

14 A. I said yes.

15 Q. Now, the purpose of this misleading of the
16 American public was what?

17 A. The purpose is to get people to believe
18 that the products that they are using are safer.

19 Q. And then?

20 A. And you maintain their addiction with
21 products that are not safe using a higher tar version of
22 the same product.

23 Q. Now, prior to October of the year 2000,
24 you had testified in, what, 20, 25 cases against Philip
25 Morris?

26 A. I don't know exactly what it was at that
27 time.

28 Q. It was a lot of cases, wasn't it?

2434

1 A. Yes.

2 Q. But you had never told this story in any
3 of those appearances that you had made before October
4 2000; isn't that right?

5 A. I'm not sure.

6 Q. This first story came about when you were
7 rooting around on the internet looking for documents and
8 you found the one you showed the jury here yesterday,
9 and then you started telling this Cambridge misleading
10 story, right?

11 A. No.

12 Q. But you never testified about it before
13 October 2000?

14 A. I don't testify about things for which I
15 do not have factual evidence to present.

16 Q. The fact of the matter is, you made up
17 this entire story, didn't you?

18 A. I did not make up the Federal Trade
19 Commission numbers, which can be shown and you can look
20 at them for yourself from 1980 through the year 2000. I
21 did not make up --

22 Q. The claim that you are making here today
23 that Philip Morris intentionally misled the American
24 public with the Cambridge 0.0 cigarette, you made it up
25 after you found that document in 2000, didn't you?

26 A. No, I did not. The man who wrote that
27 document sat on my left-hand side during the meeting,
28 and this issue was discussed with the general counsel of

2435

1 Philip Morris, Mr. Alex Holtzman.

2 MR. BLEAKLEY: I have nothing further for this
3 witness, your Honor.

4 THE COURT: Redirect.

5

6 * REDIRECT EXAMINATION

7

8 BY MR. PIUZE:

9 Q. If you didn't make up stuff about Philip
10 Morris, you know about a lot of stuff that Philip Morris
11 made up, don't you?

12 A. Yes.

13 Q. Has anyone ever told you, you root around
14 before?

15 A. Yes.

16 MR. PIUZE: Just to get us oriented here, this
17 is 2476, exhibit number --

18 THE COURT: Just give me one second. I'm sorry,
19 Counsel.

20 (A pause in the proceedings.)
21 THE COURT: Is 2476 a document that has been
22 introduced before?
23 MR. PIUZE: Yes, sir.
24 THE COURT: Okay. Hold on a moment.
25 (A pause in the proceedings.)
26 THE COURT: I see it, and it is the Richmond
27 product meeting memo, correct?
28 MR. PIUZE: Yes.

2436

1 THE COURT: Thank you.
2 BY MR. PIUZE:
3 Q. Anyway, did you make up this document?
4 A. No.
5 Q. What meeting was it that you were sitting
6 at with the general counsel of Philip Morris present and
7 the -- tell me, what meeting was that?
8 A. The Richmond meeting.
9 Q. October 15, 1979?
10 A. Yes.
11 Q. And the author of this memo was sitting on
12 your left?
13 A. Yes.
14 Q. Okay. Anyway, you didn't make up this
15 document, right?
16 A. No, I did not.
17 Q. How about this one? This is 2721.
18 THE COURT: And that is in evidence?
19 MR. PIUZE: That is in evidence.
20 THE COURT: That's the Project Trinity.
21 MR. PIUZE: This just needs two more yellow
22 lines.
23 Q. The same date, same project?
24 A. Yes.
25 Q. Did you make up these words here that I'm
26 pointing at?
27 A. I did not.
28 Q. Just one more time, read us those words so

2437

1 we will remember the words you didn't make up.
2 A. "Hit market below Carlton - afterwards can
3 drift higher."
4 Q. Was that subject discussed at the meeting?
5 A. Yes, it was.
6 Q. Is the meaning still come in at a tar
7 level lower than Carlton and then afterwards let the tar
8 level go up?
9 A. Yes.
10 Q. Is that exactly what happened?
11 A. Yes.
12 Q. During the last couple of minutes of your
13 cross-examination here, I thought I heard you say that
14 this isn't the only cigarette that something like this
15 happened with. Did I hear you say that?
16 A. That's correct.
17 Q. Were there others at Philip Morris?
18 A. Yes.
19 Q. What?
20 A. There's a Benson & Hedges packing,
21 there's a Parliament packing, there's a Virginia Slims
22 packing where the same thing happened.
23 Q. Now that we've got an Elmo, we can all
24 read your termination letter at the same time, because

25 did you only read part of this out loud before?

26 A. Yes.

27 Q. Have you ever seen this before?

28 A. Well, only when it was presented at

2438

1 trial. I was not given a copy at my termination of
2 anything.

3 Q. Okay. Well, I believe you read the first
4 sentence.

5 THE COURT: Counsel, would you be gracious
6 enough to give me the exhibit number.

7 MR. PIUZE: 5523.

8 THE COURT: Okay.

9 BY MR. PIUZE:

10 Q. So I am going to give you an opportunity,
11 Dr. Farone, to read the whole thing out loud. Are you
12 ready to do that?

13 A. Yes.

14 Q. Go ahead.

15 A. (Reading:)

16 "You are being terminated
17 from employment due to
18 irreconcilable differences with
19 management and an attitude of
20 insubordination demonstrated by
21 statements made to other
22 employees regarding your
23 threatened litigation. This is
24 not a reflection upon your
25 performance or abilities. Rather
26 it is a question of the company's
27 ability to maintain order. This
28 decision is final and has been

2439

1 reviewed by appropriate members
2 of management.

3 "I remind you that under
4 the terms of the confidentiality
5 and patent agreement signed by
6 you on April 6, 1976, that you
7 may not take proprietary
8 information or personal notes
9 from your files.

10 "We are continuing your pay
11 status for ten (10) working days
12 in accordance with your
13 confidentiality agreement and
14 pending discussions with you (and
15 if you desire your attorney) of a
16 suitable severance arrangement
17 which may include a continuing
18 consulting relationship with
19 Philip Morris. The deadline for
20 completion of such a negotiations
21 will be July 20, 1984.

22 "At this time, we request
23 that you remove your personal
24 effects and leave the premises."

25 Q. Did you?

26 A. No. Actually, I was told I didn't have to
27 do that by my boss, Dr. Hauserman.

28 Q. Let's see. You don't like this.

2440

1 So during your cross-examination on this
2 issue, we were hearing about Case and Hauserman, two
3 different people involved in this process.

4 Were those two different people involved
5 in the process?

6 A. Yes. Dr. Hauserman was my boss, and he
7 objected to this document; and Mr. Case was --

8 MR. BLEAKLEY: Objection. I object to the form.
9 It's non-responsive. It's beyond the question.

10 MR. PIUZE: I will withdraw the question, your
11 Honor.

12 THE COURT: All right. The jury is instructed
13 to disregard the answer.

14 BY MR. PIUZE:

15 Q. Were there two people who were involved in
16 this process by which you ultimately were no longer an
17 employee of Philip Morris?

18 A. Yes. This was the beginning of the
19 process. There were two people; Dr. Hauserman, my boss,
20 and Mr. Case, who was the head of employee relations or
21 something like that.

22 Q. Thank you. And I think we get the drift.
23 You say Hauserman was on your side?

24 A. That's correct.

25 Q. Your buddy?

26 A. My boss.

27 Q. Your friend?

28 A. Yes.

2441

1 Q. Okay. The guy you spoke Latin to?

2 A. Yes.

3 Q. And Case was the guy up in the office who
4 took care of hiring and firing, and he's the one who
5 told you to hit the road?

6 A. That's correct.

7 Q. I mean that's what he said, right?

8 A. Essentially, yes.

9 Q. "Get up, today"?

10 A. Yes.

11 Q. Okay. So as part of the -- as part of the
12 cross-examination that was going back and forth, I think
13 you said that your failure to get a promotion was part
14 of the reason that you and Philip Morris now had a
15 dispute.

16 Do you remember that?

17 A. That's correct.

18 Q. What was the other part?

19 MR. BLEAKLEY: Object to the form. Object to
20 two things.

21 THE COURT: Go ahead.

22 MR. BLEAKLEY: That's quoting a question. I
23 don't believe that's the way I asked the question. I'll
24 tell you what, I will withdraw the objection. Go ahead.

25 THE COURT: Okay. Do you want to rephrase -- do
26 you have the question in mind?

27 THE WITNESS: Yes, I do.

28 THE COURT: Okay.

2442

1 THE WITNESS: It's actually stated on this
2 document, the other reason. Irreconcilable differences
3 with management.

4 MR. PIUZE: Okay. Thank you.

5 Q. Now, was a centerpiece of the reasons for

6 you leaving the company something that involved your
7 wife?

8 A. Yes, it was.

9 Q. At one point this morning you mentioned
10 something about a consent decree, but then that went
11 away; and I am going to give you the opportunity to
12 explain it.

13 Was a consent decree involved in this
14 situation involving your wife?

15 A. Yes, it was.

16 Q. How?

17 A. Philip Morris had signed a consent decree
18 by which they agreed to promote females and minorities
19 within the company, and my wife was selected to be one
20 of the females to be promoted under the consent decree.

21 Q. Okay. And had -- I mean, this was all
22 done -- everyone knew about this? You knew about this?

23 A. Yeah.

24 Q. And then it didn't happen?

25 A. No. Excuse me. It didn't happen.

26 Q. Your wife wasn't happy?

27 A. That's correct.

28 Q. Did your wife discuss with you the

2443

1 possibility of doing something legally about this?

2 A. Yes, she did.

3 Q. The reason?

4 A. She felt she owed it to the rest of the
5 females at Philip Morris to take action.

6 MR. BLEAKLEY: We are getting pretty far
7 afield, your Honor. I am going to object to it.

8 THE COURT: The objection is sustained. It's
9 calling for hearsay testimony, in any event. The jury
10 will be instructed to disregard the answer that begins
11 with what his wife told him.

12 So everything after, "Did your wife
13 discuss with you the possibility of doing something
14 legal about this," the answer "yes, she did" may stand,
15 and everything else is stricken.

16 BY MR. PIUZE:

17 Q. Did you learn that -- from your wife that
18 she wasn't going to get a promotion?

19 A. Yes.

20 Q. Did you assume that would impact on your
21 career at Philip Morris?

22 A. Yes.

23 Q. How did you assume that would impact on
24 your career at Philip Morris?

25 A. Because of any complaints that would be
26 made would reflect upon me.

27 Q. Had you -- this is on the issue of
28 insubordination now. Did you believe that in discussing

2444

1 your employment status with your subordinates, the
2 scientists under you, that that was insubordination?

3 A. I did not.

4 MR. BLEAKLEY: Objection. Relevance.

5 THE COURT: On relevance the objection is
6 overruled. The answer may stand.

7 BY MR. PIUZE:

8 Q. You did not?

9 A. I did not.

10 Q. Okay. Forgive me for pointing.

11 In the past had it befallen you one way or
12 another as one of your tasks to sort of soothe the
13 feathers of subordinates?

14 A. Yes, it had.

15 Q. And you know the kind of things that
16 happen with companies, people have hurt feelings. Were
17 you sort of a person that your subordinates came to for
18 comfort?

19 A. Yes.

20 Q. Did Philip Morris give you an award for,
21 in effect, insubordination?

22 A. Yes, they did.

23 Q. Explain.

24 A. I -- we developed second technology or my
25 scientists felt it would be a good idea to develop a
26 technology to put lots of holes in filters using lasers;
27 and the idea of using lasers in a cigarette company was
28 considered farfetched.

2445

1 I got together with the vice-president of
2 engineering. I spent part of my budget, he spent part
3 of his, and we secretly put together a demonstration for
4 the management of the company of how this would work.

5 We showed them the demonstration, and they
6 gave us both an award, in effect, for insubordination;
7 that is, for doing something that they hadn't wanted us
8 to do.

9 Q. In addition to getting an award for doing
10 that, that you weren't supposed to be doing, it worked
11 out, did they lend you to the United States of America
12 General Services Administration?

13 A. Yes, they did.

14 Q. For what purpose?

15 A. For the purpose of helping to tell people
16 how to get through the bureaucracy to get things done.

17 Q. Did Philip Morris pay for you to go to
18 Washington and have you talk to United States of America
19 GSA people about how to navigate the bureaucracy and
20 make things happen?

21 A. Yes, they did.

22 Q. Last on this issue here. The promotion
23 that had been publicly announced for you was to be the
24 boss of research and development. I heard you say this
25 morning that that would have meant that you would have
26 been superior to Dr. Osdene. Did I hear that correctly?

27 A. That's correct.

28 Q. Did you want that?

2446

1 A. That would have been my chance to impact
2 the biology programs, biological testing, yes.

3 Q. So were you looking forward to being the
4 boss down there of the research and development?

5 A. Yes, I was.

6 Q. Why --

7 A. So I could make --

8 Q. -- please?

9 THE COURT: Excuse me?

10 MR. PIUZE: "Please." That was me.

11 THE COURT: I'm sorry.

12 BY MR. PIUZE:

13 Q. Why, please?

14 A. To make changes.

15 Q. Why?

16 A. To get some of the testing done that I
17 thought needed to be done.

18 Q. To get some of the testing done that you
19 thought needed to be done to save human life?

20 MR. BLEAKLEY: Objection.

21 THE COURT: Objection sustained. That's
22 leading. Let's not keep going over that again, please.

23 BY MR. PIUZE:

24 Q. To get testing done that had been refused
25 in the past?

26 THE COURT: That is also leading.

27 BY MR. PIUZE:

28 Q. Had you suggested testing in the past

2447

1 that -- question mark.

2 THE COURT: Also leading.

3 MR. BLEAKLEY: It's leading and we went through
4 it yesterday.

5 THE COURT: Well, I know. Let's just deal with
6 one of them at a time.

7 Where the question suggests the answer,
8 that is leading.

9 BY MR. PIUZE:

10 Q. Well, were you looking forward to becoming
11 the boss of R&D in order to accomplish some things that
12 you had not yet been able to accomplish?

13 THE COURT: That's leading, Counsel. It hasn't
14 changed. It is the same rules; leading.

15 MR. PIUZE: Excuse me?

16 THE COURT: Same rules, still leading. When you
17 give him the answer as part of the question, it's a
18 leading question.

19 Let's move on to another area, please.

20 MR. PIUZE: Yes.

21 THE COURT: Thank you.

22 BY MR. PIUZE:

23 Q. As far as the gentlemen's agreement is
24 concerned, Dr. Farone, who told you that Philip Morris
25 broke that agreement all the time in an attempt to be
26 the first company to make a safe cigarette? Anyone?

27 A. The gentlemen's agreement was discussed
28 with many people. I don't recall who said that

2448

1 specifically.

2 Q. Did anyone say that?

3 A. One of the purposes of the testing being
4 done in Europe --

5 MR. BLEAKLEY: Objection.

6 THE COURT: No, sir. The question is: "Did
7 anyone say that?" The appropriate answer is either yes,
8 no, or "I don't remember."

9 He will ask other question.

10 THE WITNESS: I don't remember.

11 MR. PIUZE: I'll break it up into a smaller one.

12 Q. Did anyone say that the gentlemen's
13 agreement was broken by Philip Morris all the time?

14 A. No.

15 Q. All right. Did anyone say that the
16 gentlemen's agreement was broken by Philip Morris?

17 A. Yes.

18 Q. This morning you mentioned there was two
19 reasons or there were two reasons given by people at
20 Philip Morris for why the agreement was broken.

21 Do you recall that?
22 A. Yes.
23 Q. We didn't get to hear the second reason.
24 Do you recall that?
25 A. No.
26 Q. All right. What were the reasons given?
27 A. One reason was to find out what the
28 competitive products -- how your products ranked

2449

1 relative to competitive products.
2 Q. Okay.
3 A. And the other reason was to determine
4 whether or not you were making progress with your own
5 projects.
6 Q. Okay. You said something this morning.
7 You mentioned Marlboro several times in regard to
8 cross-examination on Cambridge cigarettes.

9 Do you recall that?
10 A. Yes.
11 Q. I think the question was something like
12 this: If Philip Morris could make a safe cigarette and
13 be the first to do it, it would make billions of
14 dollars, right?

15 Do you remember that question?
16 A. Yes, I do.
17 Q. I believe your response was something
18 like, "They were already making billions of dollars."

19 Do you remember that?
20 A. Something to that effect, yes.
21 Q. Were there discussions at Philip Morris to
22 which you were privy, you were there, you were
23 listening, you are hearing, in which top-ranked
24 scientists and/or executives were discussing risking the
25 Marlboro franchise if safe cigarettes were promoted?

26 A. Yes.
27 Q. At the time you were at Philip Morris, was
28 Marlboro the dominant American brand cigarette?

2450

1 A. Yes.
2 Q. At the time you were at Philip Morris, was
3 Marlboro the moneymaker for Philip Morris?

4 A. Yes.
5 Q. With an emphasis on "the"?
6 A. Yes.
7 Q. What was said at Philip Morris about
8 risking the Marlboro franchise if safe cigarettes or
9 safer cigarettes were going to be featured heavily,
10 please?

11 A. They would not do it.
12 Q. Reason?
13 A. They didn't want to risk the Marlboro
14 franchise.
15 Q. On this topic, one of your answers was
16 that they might have -- "they" meaning Philip Morris --
17 might have lost money instead of making billions by
18 heavily promoting Cambridge as the first safe cigarette.

19 Do you remember that?
20 A. Yes.
21 Q. Why do you say that?
22 A. Well, if you called it -- if you call it
23 Marlboro and it wasn't as acceptable as the current
24 Marlboro, then rather than gain market, you would lose
25 market. So that represented a risk that you would

26 actually lose market share rather than gain market
27 share.

28 Q. Still on the issue of Cambridge

2451

1 cigarettes, you mentioned on cross-examination that you
2 asked the general counsel of the company if a certain
3 plan was legally allowable.

4 Do you recall that?

5 A. Yes.

6 MR. BLEAKLEY: Objection. That was a
7 volunteered answer that was non-responsive to a question
8 on cross-examination.

9 THE COURT: I think it was volunteered. So just
10 fashion a question, if you would.

11 MR. PIUZE: Sure. Sorry.

12 Q. Did you have occasion to look the general
13 counsel of Philip Morris right in the eye and -- is it a
14 him? -- and ask him a question about whether something
15 having to do with Cambridge cigarettes is legally
16 allowable?

17 MR. BLEAKLEY: Objection. Leading.

18 THE COURT: Well, it is leading, but it's simply
19 asking for a yes or no answer. He either did have or he
20 didn't have; and then if the answer is he didn't have
21 that opportunity, we move on; and if the answer is he
22 did have that opportunity, then my guess is the question
23 is going to be what was said, which is not leading.

24 MR. PIUZE: Thank you.

25 THE COURT: You're welcome.

26 THE WITNESS: Yes.

27 BY MR. PIUZE:

28 Q. What was said?

2452

1 A. That the only obligation that Philip
2 Morris had was to report the tar numbers to the Federal
3 Trade Commission exactly as it was in the products that
4 were sold. So we could change them up, down, around any
5 way we wanted to, because the only obligation was to
6 report the numbers.

7 Q. Just for the record, what's the general
8 counsel?

9 A. Well, general counsel in this case is the
10 highest ranking attorney in a particular corporation.

11 Q. Yesterday you discussed a meeting at which
12 a Mr. Newman, the assistant general counsel, was
13 present.

14 Do you remember that?

15 A. Yes, I do.

16 Q. Was that the second ranking Philip Morris
17 lawyer at the time?

18 A. Yes.

19 MR. BLEAKLEY: Your Honor, this is not redirect.

20 THE COURT: Sustained.

21 BY MR. PIUZE:

22 Q. Just so we can be clear, when you say
23 "lawyer," you mean an employee of Philip Morris, someone
24 that worked for the company?

25 MR. BLEAKLEY: Same objection.

26 THE COURT: Well, you are right, but I am going
27 to let him answer that just so we get in context who he
28 is talking about.

2453

1 THE WITNESS: Yes.

2 THE COURT: Do you understand the question?
3 THE WITNESS: Yes, I do.
4 THE COURT: And the answer is?
5 THE WITNESS: Yes.
6 THE COURT: Okay.
7 MR. PIUZE: Thank you.

8 Q. I think you should explain the testing
9 done here in the U.S. of reference cigarettes. You were
10 talking about chemistry, I believe, versus the testing
11 overseas of commercial product.

12 What's the difference, please?

13 A. Well, the difference in testing a --
14 reference cigarettes are incorporated in all kinds of
15 tests, chemical tests and biological tests, so that if
16 you compare Product A versus the reference in one kind
17 and then later you come back and you compare Product B
18 versus the reference, and in one case, A is more toxic
19 than the reference and in the other case, B is less
20 toxic than the reference, then you can come to some
21 conclusion about A and B without having to test them at
22 the same time.

23 So that's the purpose in the reference
24 cigarettes both in the chemical tests in Richmond and in
25 the United States and in the in vivo or animal tests or
26 those kinds of tests done in Europe.

27 Q. You were asked to agree that all of the
28 things done by Philip Morris were to reduce carcinogenic

2454

1 chemicals, something to which you said you did not
2 agree, early in your cross-examination.

3 Do you recall that?

4 A. I do.

5 Q. Why did you not agree?

6 A. Because many of the changes that were
7 made, particularly with regard to things that were
8 added, according to the evidence that we had, increased
9 the mutagenicity. In other words, in tests done on
10 mutagenicity, the scores on those tests was increased.

11 Q. Also early in your cross-examination, you
12 were asked about benzo-pyrene as a carcinogenic.

13 Do you recall that?

14 A. Yes.

15 Q. You stated flat-out that it wasn't
16 suspected, but it was known to be carcinogenic as of
17 '64. Why did you say that?

18 A. Because I finished my Ph.D. program in
19 1964; and as part of the course I mentioned earlier on
20 heterocyclic chemistry, that is one of the classic
21 examples of a carcinogen that is a heterocyclic
22 chemical.

23 Q. You mentioned that you personally knew it
24 was a carcinogen as of '59. Why do you say that?

25 A. Because that's when I took the first
26 organic chemistry course where we were told certain
27 classes of materials were carcinogenic.

28 Q. Are you talking about as a freshman in

2455

1 college?

2 A. Actually, I was a junior that year.

3 Q. So you learned that as a junior in college?

4 A. Yes.

5 Q. You stated that benzo-pyrene could have
6 been totally eliminated. Why do you say that?

7 A. In the mainstream smoke, simply because of
8 the filtration, for example, products like Cambridge,
9 where in terms of what's coming through that's being
10 burned, it's virtually nothing.

11 Q. You said Philip Morris did not totally
12 eliminate it. Why did you say that?

13 A. Because you can still find it in smoke
14 from the products.

15 Q. You stated that a 90 percent reduction in
16 tar is a step in the right direction but it fell well
17 short. Why did you say that?

18 MR. BLEAKLEY: Asked and answered, your Honor.

19 THE COURT: Overruled.

20 THE WITNESS: The tremendous amount of chemicals
21 left in even 10 percent is huge compared to levels, for
22 example, in environmental tobacco smoke. So the
23 reductions needed to be, as I said, by orders of
24 magnitude, not by percentages.

25 In other words, it would have had to be
26 like a thousandth of the amounts that were being
27 delivered and not just 90 percent reduction.

28 BY MR. PIUZE:

2456

1 Q. So you are talking about
2 99-point-something reduction?

3 A. 99.99 percent.

4 Q. You were asked about The Tobacco Working
5 Group and about whether the government and industry were
6 working together. Your answer was, "in principle."
7 Explain, please.

8 A. Well, in principle, industry scientists
9 were working with government scientists, but there were
10 certain restrictions. They were agreed to; but the
11 restrictions did not, for example, allow Marlboro to be
12 tested against Winston or Cambridge or things of that
13 type, which would have gave further information about
14 whether progress was being made with the technology we
15 had at the time.

16 Q. You stated there were at least two
17 documents that you authored at Philip Morris complaining
18 about research. What were they?

19 A. In one document I recommended that we
20 reconsider making a cigarette that could not be inhaled;
21 and in the other document, I made the suggestion that
22 Philip Morris not oppose R.J. Reynolds in seeking lower
23 nicotine tobacco.

24 Q. There was a -- there was a series of
25 questions about Dr. Osdene's responsibility. You agreed
26 that he was involved in biological research, behavioral
27 research to some extent, developing a safer cigarette,
28 and you said he had a separate job duty to maintain

2457

1 controversy. Obviously, you remember that testimony?

2 A. Yes, I do.

3 Q. Your testimony was that he had a separate
4 team to maintain the controversy. Explain that,
5 please. What did you mean, "a separate team"?

6 A. There were several people reporting to
7 Dr. Osdene who collected information that could be used
8 to cast doubt upon the information being provided by the
9 public health authorities. I can name, if you want, the
10 people that were on that team.

11 Q. I don't really care.

12 Their job was to cast doubt about whether
13 or not the cigarettes that you people knew caused cancer
14 really caused cancer?

15 A. That's correct.

16 Q. You testified that it wasn't just
17 Dr. Osdene but also Dr. Seligman, the boss, that told
18 you it was Osdene's job to maintain controversy.

19 Do you recall that?

20 MR. BLEAKLEY: I am going to object, it's
21 leading; and secondly, that is not the response to a
22 question I asked. It was another instance where
23 Dr. Farone was volunteering information that was not
24 responsive.

25 MR. PIUZE: I will withdraw the question.

26 Sorry.

27 Q. Was it only Dr. Osdene that told you on
28 numerous occasions, "Hey, one of my job duties is to

2458

1 maintain controversy"?

2 MR. BLEAKLEY: And this is not redirect, your
3 Honor. I object.

4 THE COURT: Overruled.

5 THE WITNESS: No, it was not.

6 BY MR. PIUZE:

7 Q. Who else?

8 A. Dr. Seligman, Dr. Wakeham, Dr. Jim
9 Charles, Mr. Robert Carpenter, Mr. William Kuhn,
10 Dr. Fagan, Dr. William Dunn.

11 Q. Why did you stay there knowing that,
12 Dr. Farone?

13 A. I thought I could change it.

14 Q. When you left in 19 -- excuse me --
15 1984 -- am I remembering correctly, December?

16 A. July, actually September. It depends on
17 which date, but July I was notified of my termination.
18 The official termination was in September.

19 Q. Okay. Anyway, after September of 1984, I
20 guess you have already said you were employed within a
21 week; is that right?

22 A. Well, I had my own company. I had a
23 client within a week.

24 Q. Okay. So by the end of 1984, did you
25 start your career testifying against Philip Morris?

26 MR. BLEAKLEY: Objection.

27 MR. BLEAKLEY: Your Honor, this was testified to
28 yesterday. It is not redirect examination.

2459

1 THE COURT: Overruled.

2 THE WITNESS: No, I did not.

3 BY MR. PIUZE:

4 Q. '85?

5 A. No.

6 Q. '88?

7 A. No.

8 Q. '91?

9 A. No.

10 Q. '92?

11 A. No.

12 Q. Before you ever took any witness stand
13 ever anywhere against Philip Morris, was there the
14 intervention of the United States of America Food and
15 Drug Administration first?

16 MR. BLEAKLEY: Objection. Testified to

17 yesterday.

18 THE COURT: Well, the objection is sustained.
19 It is not redirect, and I have no idea what the word
20 "intervention" means, and I don't know how the witness
21 is going to know what it means. So let's move to a
22 different question, please.

23 MR. PIUZE: I will. Better question. I
24 apologize for that one.

25 Q. What was the catalyst -- you are a
26 chemist. Do you know what a catalyst is?

27 A. Yes, I do.

28 Q. What is a catalyst?

2460

1 A. It increases the rate of a reaction or
2 decreases it. Positive catalyst and negative catalyst.

3 Q. What was the catalyst that occurred by
4 which you are now sitting in that witness stand up there
5 for at least however many times it has been testifying
6 against Philip Morris, most of them for free?

7 MR. BLEAKLEY: Same objection, your Honor. This
8 was testified to yesterday.

9 THE COURT: On the basis of that objection, the
10 objection is overruled. You may answer.

11 THE WITNESS: The Food and Drug Administration.

12 BY MR. PIUZE:

13 Q. After you started your discussions with
14 the Food and Drug Administration, how long was it before
15 you publicly said or did anything that was in opposition
16 to Philip Morris?

17 A. A little over two years.

18 Q. Why did you stop giving testimony for free
19 around the country, please?

20 A. It was becoming a burden on my company.

21 Q. Now, Dr. Farone, you've testified that
22 80 percent of your time was spent in the lab and
23 basically working -- let me change that.

24 You've testified that 80 percent of your
25 time had to do with safer cigarettes; is that correct?

26 A. Yes.

27 Q. What was the other 20 percent, please?

28 A. Trying to find acquisition opportunities

2461

1 for Philip Morris.

2 MR. BLEAKLEY: I'm sorry to sound like a broken
3 record, but this is repetitive from yesterday, it's not
4 relevant, and it's leading. We are just repeating
5 things we heard yesterday.

6 THE COURT: Sustained.

7 BY MR. PIUZE:

8 Q. Did you make recommendations to your
9 bosses at Philip Morris about other ways to give the
10 American people their nicotine without causing cancer?

11 MR. BLEAKLEY: Objection to the form. Leading.

12 THE COURT: Sustained.

13 BY MR. PIUZE:

14 Q. As the other 20 percent of your -- you
15 know what? I will kill that.

16 As it applied to both parts of your job,
17 did you discuss alternative nicotine delivery devices
18 with your superiors at Philip Morris?

19 MR. BLEAKLEY: This is -- this has nothing to
20 do with my cross-examination, your Honor.

21 THE COURT: Sustained.

22 BY MR. PIUZE:

23 Q. Was the Cambridge 0.00 tar the only
24 nicotine delivery device that you were working on that
25 had no tar?

26 MR. BLEAKLEY: Same objection.

27 THE COURT: Overruled.

28 THE WITNESS: No.

2462

1 BY MR. PIUZE:

2 Q. What else, please?

3 A. The use of nicotine in inhalers or in
4 other devices where there would be no tar whatsoever.

5 Q. Did you and your bosses actually pursue
6 these devices?

7 MR. BLEAKLEY: Your Honor, this is a brand new
8 subject. It has nothing --

9 THE COURT: Sustained.

10 BY MR. PIUZE:

11 Q. Well, Dr. Farone, I heard questions to you
12 about Accord. Do you remember that?

13 A. Yes.

14 Q. What is Accord?

15 A. Accord is an unconventional cigarette that
16 heats rather than burns tobacco.

17 Q. No fire?

18 A. No fire, just heat.

19 Q. Nicotine delivery device without lighting
20 up a cigarette?

21 A. That's correct.

22 Q. You did talk about that in
23 cross-examination here?

24 A. Yes.

25 Q. Were there other nicotine delivery devices
26 that you worked on down at Philip Morris without
27 lighting up a cigarette?

28 A. Yes.

2463

1 Q. With the goal that the people could get
2 the nicotine and not kill themselves?

3 A. Yes.

4 MR. BLEAKLEY: Objection. Leading and
5 argumentative.

6 THE COURT: Sustained. The jury is instructed
7 to disregard the answer.

8 MR. PIUZE: And I will withdraw the question and
9 I apologize.

10 Q. Aside from the Accord, tell the jury about
11 the other nicotine delivery devices you discussed with
12 your bosses that Philip Morris could get into to provide
13 nicotine to people that wouldn't hurt them.

14 MR. BLEAKLEY: Objection. It's beyond the scope
15 of cross. It's a brand new subject. Relevance.

16 THE COURT: Well, it is beyond the scope. I
17 will let him answer. I take it your answer is a brief
18 one?

19 THE WITNESS: Yes.

20 THE COURT: Go ahead.

21 THE WITNESS: Inhalers and gum were the two
22 major other nicotine delivery devices.

23 BY MR. PIUZE:

24 Q. Just tell the jury what steps you took in
25 that regard, please.

26 MR. BLEAKLEY: Objection.

27 THE COURT: Now we really are going beyond
28 cross-examination. Sustained.

2464

1 MR. PIUZE: Dr. Farone, thank you very much.
2 THE COURT: Recross?
3 MR. BLEAKLEY: Very brief.

4
5 * RECROSS EXAMINATION
6

7 BY MR. BLEAKLEY:

8 Q. Since we have the Elmo working, I would
9 like to display Exhibit 5522, which is the letter that
10 you wrote to Dr. Hauserman on June 26, 1984 in which you
11 advised him that you were --

12 THE COURT: Counsel, let me just make sure that
13 we are talking about the same thing.

14 MR. BLEAKLEY: Okay.

15 THE COURT: You labeled that as 5522?

16 MR. PIUZE: 5522.

17 THE COURT: I apologize. I wrote it down
18 incorrectly. You said it right and I wrote it wrong. I
19 apologize. 5522 is a letter?

20 MR. BLEAKLEY: From Dr. Farone to
21 Dr. Hauserman --

22 THE COURT: Go ahead.

23 BY MR. BLEAKLEY:

24 Q. -- in which you advised him that you had
25 retained an attorney for the purpose of taking whatever
26 legal actions are necessary to protect your career,
27 right?

28 A. Yes. Discriminatory treatment, that's

2465

1 correct.

2 Q. And that you instructed your attorney to
3 prepare to file a complaint, right?

4 A. That's correct.

5 Q. This is what you told your boss,
6 Dr. Hauserman?

7 A. I wrote to him, yes.

8 Q. Okay. Now, the two Cambridge documents --
9 which I seem to have misplaced. May I borrow yours?

10 MR. PIUZE: Please.

11 MR. BLEAKLEY: Exhibit 2476 and Exhibit 2721.

12 THE COURT: I'm sorry. 2476, and the other one
13 is?

14 MR. BLEAKLEY: 2721.

15 THE COURT: Give me a moment.

16 (A pause in the proceedings.)

17 BY MR. BLEAKLEY:

18 Q. Exhibit 2721 is the notes prepared by one
19 of the people who participated in this meeting on
20 October 15, 1979, right?

21 A. That's correct.

22 Q. Where does it say in that document that
23 the purpose of the Trinity Project was to mislead the
24 American people?

25 A. It doesn't say it in that document.

26 Q. And Exhibit 2476, the memorandum from
27 T.T. Goodale to distribution, dated October 19, which
28 was about the October 15 meeting, correct?

2466

1 A. That's correct.

2 Q. Where does it say in that memorandum that

3 the purpose of the Trinity Project and the 0.00 tar
4 cigarette was to mislead the American public?

5 A. It does not say it.

6 MR. BLEAKLEY: I have nothing further.

7 THE COURT: All right. Anything further?

8 MR. PIUZE: May this witness be excused?

9 THE COURT: Yes, indeed, he may.

10 Before we take our recess, however -- you
11 are free to leave as soon as you get your microphone
12 off -- I want to read to the jury an instruction. You
13 will hear it later on again, but I think it's important
14 that you hear it now.

15 The sale of cigarettes is and has been at
16 all times a lawful activity in this state. You cannot
17 find Philip Morris liable for plaintiff's injury, nor
18 can you punish Philip Morris solely because Philip
19 Morris makes, advertises, or sells cigarettes.

20 We will take an afternoon recess and
21 during which time I will talk to the lawyers about going
22 forward. We will see you back in 15 minutes, and we
23 will see if we can't have some additional testimony this
24 afternoon.

25 Don't discuss this amongst yourselves or
26 with anyone else. Do not form or express any opinion
27 until the matter is finally submitted to you; and I
28 thank all of you for not moving your lips when I say

2467

1 that.

2 (Laughter.)

3

4 (A recess was taken in the proceedings.)

5

6 (The following proceedings were held
7 in open court within the presence of
8 the jury:)

9

10 THE COURT: Okay. The record will reflect the
11 jury is present and in the box.

12 Mr. Piuze, you may call your next
13 witness.

14 MR. PIUZE: Dr. Michael Cummings, please.

15 THE COURT: Dr. Cummings, would you be kind
16 enough to come right over and stand next to the witness
17 bench and raise your right hand and face me.

18 Do you solemnly state the testimony you
19 may give in the cause now pending before this court will
20 be the truth, the whole truth, and nothing but the truth
21 so help you God?

22 THE WITNESS: I do.

23 THE COURT: Would you be seated, please. We
24 will give you a lapel microphone; and in a loud, clear
25 voice, would you state your full name and spell both
26 your first and last name.

27 THE WITNESS: Sure. My name is Kenneth Michael
28 Cummings, and it's K-e-n-n-e-t-h, C-u-m-m-i-n-g-s.

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1 THE COURT: Okay. Dr. Cummings, have you been
2 in court as a witness before?

3 THE WITNESS: Yes, I have.

4 THE COURT: Okay. Then you know the ground
5 rules are that you wait until the lawyer has concluded
6 his question and answer only what is asked. If only yes
7 or no, just give us a yes or no, and the lawyer will

8 then follow up with another question in the direction
9 that the lawyer wants to go.

10 If the other side objects, stop in the
11 middle of a sentence, in the middle of a word; and
12 finally make sure that you allow whoever it is that is
13 asking you a question to finish the question before you
14 start your answer, otherwise the court reporter will
15 have a very difficult time trying to get answers from
16 both of you.

17 Okay?

18 THE WITNESS: Yes, sir.

19 THE COURT: Thank you, sir.

20
21 * KENNETH MICHAEL CUMMINGS, PH.D.,
22 Called by the plaintiff(s) as a witness, was sworn and
23 testified as follows:

24
25 THE COURT: All right. Mr. Piuze, you may
26 start.
27
28

2469

1 * DIRECT EXAMINATION
2
3 BY MR. PIUZE:
4 Q. Good afternoon.
5 A. Good afternoon.
6 Q. So I said Michael and you said Kenneth
7 Michael. What name do you usually go by?
8 A. Michael.
9 Q. What is your occupation, please?
10 A. I am a senior research scientist.
11 Q. Where?
12 A. Roswell Park Cancer Institute, which is
13 located in Buffalo, New York.
14 Q. What do you do at Roswell Park Cancer
15 Institute as a senior research scientist, please?
16 A. I'm the chairman of the department of
17 cancer prevention epidemiology and biostatistics.
18 Q. We had an epidemiologist here named
19 Richard Doll. Ever hear of him?
20 A. Yes, I have.
21 Q. What is biostatistics, please?
22 A. Biostatistics is basically the application
23 of statistics or mathematics to biological problems;
24 health studies, for example.
25 Q. How long have you been involved in
26 biostatistics?
27 A. Well, I don't have a degree in
28 biostatistics, but I have been directing the program

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1 with biostatistics for the last four years.
2 Q. Okay. So you said cancer prevention,
3 epidemiology, biostatistics.
4 How long have you been involved in
5 epidemiology, please?
6 A. Twenty-one years. I have been teaching
7 epidemiology to our graduate students.
8 Q. How long have you been involved in cancer
9 prevention?
10 A. Twenty-one years.
11 Q. Do you have academic degrees?
12 A. Yes.

13 Q. Could you outline your educational
14 background for the jury, please.
15 A. Sure. I received my undergraduate degree
16 from Miami Ohio in health education. Basically, I was
17 trained to be a teacher to go do health teaching and
18 physical education.
19 I decided I would prefer to go to graduate
20 school and got interested in public health and went on
21 to the University of Michigan where I did a Master's in
22 public health for two years; and liked that and got
23 interested in the research and went on and did a Ph.D.
24 in health education and health behavior at the
25 University of Michigan.
26 Q. What year did you get your Ph.D.?
27 A. 1980.
28 Q. Where is the first place you worked after
1 you got your Ph.D.? 2471
2 A. The first place I worked was Wayne State
3 University. It was actually a little bit of a
4 transition. I started to work there as I was finishing
5 up the dissertation, which is a big research project you
6 have to do in order to get the Ph.D. degree.
7 I continued to work at Wayne State for
8 about a year after I had finished my Ph.D. and got my
9 degree at Michigan, and then I left to go to Roswell
10 Park.
11 Q. What kind of a -- how big a place is
12 Roswell Park? Do you want to give us an idea?
13 A. Sure. It's a big place. About 1500
14 employees work there. There are about 250 Ph.D.s and
15 M.D.s, so that's considered the professional research
16 staff that are there. We are a hospital as well as a
17 research institution. We are the oldest comprehensive
18 cancer center in the United States, over 100 years old.
19 Q. What's cancer prevention?
20 A. Cancer prevention is basically efforts
21 that are undertaken to try to prevent the occurrence of
22 cancer. So health education is a big part of cancer
23 prevention.
24 Another main area of prevention, what we
25 call secondary prevention, is early detection of
26 disease. So some of the programs under my direction are
27 also involved in doing cancer screening, early detection
28 of cancer. 2472
1 Q. Is -- this is my first really stupid
2 question to you -- is tobacco involved in cancer
3 prevention?
4 A. Yes, it is.
5 Q. Why?
6 A. Tobacco puts more people in our hospital
7 than anything else. One-third of the patients that come
8 into our hospital are there because of their use of
9 tobacco products, primarily cigarettes.
10 Q. How long has that been the case?
11 A. Certainly as long as I've worked at
12 Roswell Park and actually well before I actually even
13 came to Roswell Park. It was a big part of the cancer
14 prevention program there to do research on the causes of
15 cancer, of which tobacco was identified early on as one
16 of the main causes.
17 Q. If one of your jobs is cancer prevention,

18 does your job involve tobacco to some extent?
19 A. Yes.
20 Q. To what extent?
21 A. In my personal activities, it's about
22 95 percent of what I do is related to tobacco and
23 tobacco prevention, education, smoking cessation
24 programs.
25 Q. How long has that been the case?
26 A. It's been the focus of my work almost the
27 entire time I've been at Roswell. Maybe the first year
28 that I was at Roswell, I did primarily screening-related

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1 work; but 1982, that's when I started really getting
2 involved in the tobacco end of our program and have been
3 running that and actually directing the program for the
4 last 20 years.

5 Q. Although you are at Roswell Park in
6 Buffalo, New York, do you have California appointments
7 and/or duties?

8 A. Yes, I do.

9 Q. What?

10 A. Well, I serve as the chairperson, actually
11 co-chair, of the evaluation advisory committee for the
12 California Department of Public Health's Prop 99
13 Program, their tobacco education program that started
14 back in 1989 here in California.

15 Q. Why, if you are professionally
16 headquartered across the country in Buffalo, New York,
17 are you the co-chair of the California Prop 99
18 committee, whatever the official name is?

19 A. Well, I was invited to serve in that role,
20 I think, primarily because of my expertise in doing
21 tobacco epidemiology and research.

22 Q. Do you know how to treat a cough?

23 (Laughter.)

24 A. Don't smoke.

25 (A pause in the proceedings.)

26 THE COURT: While we are waiting, the answer to
27 the question, "Is it possible for us to have the jury
28 instructions in writing?" Absolutely. All of the

2474

1 instructions, some that I have given earlier, some that
2 I gave today, and some that you have never heard, each
3 and every one of you will have his or her separate jury
4 instruction booklet.

5 All of the instructions will be in it, and
6 any additional information, such as exhibits that have
7 been received in evidence, that the lawyers want you to
8 have in the booklet will also be there; otherwise, you
9 obviously will be at liberty to take everything that has
10 been introduced in with you.

11 But clearly, it is our practice to always
12 make sure that you have the jury instructions and,
13 indeed, you will have them so that when I give them, if
14 you choose to do so, you can read along as I give them.

15 I'm sorry to have interrupted.

16 MR. PIUZE: You didn't. It's fine.

17 Q. Okay. Anyway, what are your
18 responsibilities here in California, please, as far as
19 the Prop 99 committee?

20 A. Well, as co-chair of that committee, we
21 meet twice a year. We're invited by the officials in
22 the Health Department to convene an advisory group,

23 which is made up of experts from all over the country,
24 to review the plan that the Health Department has
25 outlined for evaluating the program.

26 They want to know whether their program is
27 working, they want to know whether they ought to modify
28 their program to work more effectively, where they ought

2475

1 to spend their money, basically is what it comes down
2 to.

3 So as the evaluation advisory group, we
4 are an external body to review the plans that the Health
5 Department has looked at and make modifications and
6 recommendations of how to do that.

7 The Health Department allocates, you know,
8 several million dollars annually to their evaluation
9 activities, hiring survey contractors to do, you know,
10 population surveys to determine, you know, what the
11 smoking rates are and different sub groups and so on,
12 and we make recommendations.

13 And, in fact, I have served on the review
14 panels for some of those contracts to select the best,
15 most qualified groups to do the studies.

16 Q. How long have you been associated with the
17 Prop 99 committee here in California, please?

18 A. I believe I started that activity in the
19 early 1990s. I think 1991 or 1992, I believe.

20 Q. Thank you.

21 Now, have you had involvement with the
22 Surgeon General's reports?

23 A. Yes, I have.

24 Q. Explain, please.

25 A. Well, I've served as both a contributor;
26 in other words, invited to contribute a chapter to the
27 reports in a couple of the reports and I've also served
28 as a reviewer of the reports.

2476

1 Sometimes reviewers are asked to review
2 certain sections. I have done that; and for some of the
3 reports I have been asked to review the entire report to
4 look at the overall recommendations that are made.

5 Q. When was the first time that you were
6 involved with the Surgeon General's reports, please?

7 A. 1989.

8 Q. Have you maintained your involvement ever
9 since?

10 A. Yes.

11 Q. Is the Surgeon General's report -- I guess
12 I could say it better.

13 Are the Surgeon General's reports the only
14 kinds of documents regarding smoking and the effects of
15 smoking that you review?

16 A. No.

17 Q. Have you been a reviewer for various
18 scientific journals?

19 A. Yes, I have.

20 Q. What is a reviewer in that regard, please?

21 A. Well, a reviewer is sent a paper and asked
22 to comment on the merits of the paper, the methodology
23 that's used, basically looking at the conclusions that
24 are obtained in the paper and making, you know,
25 basically making comments as to whether they are valid.

26 Oftentimes, we make recommendations back
27 to the author of the paper to answer questions that are

28 a little unclear; and sometimes we recommend to the

2477

1 editor of the journal that either it's such a great
2 paper, they ought to publish it right away; or in some
3 cases, we say this is really not adding anything new to
4 the literature and we would recommend rejecting the
5 paper.

6 Q. Have you yourself published scientific
7 papers?

8 A. Yes, I have.

9 Q. Roughly, how many?

10 A. Over 160.

11 Q. Do some of those deal with tobacco?

12 A. Most do.

13 Q. How long have you been -- are these
14 peer -- excuse me -- are these peer-reviewed scientific
15 papers?

16 A. Right, they are.

17 Q. How long have you been publishing
18 peer-reviewed scientific papers regarding tobacco?

19 A. Basically since I've arrived at Roswell.

20 Probably the beginning in 1982, I think, might have been
21 my first paper on tobacco. I'd have to go back and look
22 at my CV.

23 Q. Do you do research up there at Roswell
24 Park based on grants that are provided to you?

25 A. Yes, I do.

26 Q. Tell us some of the companies or
27 organizations or government branches that have sponsored
28 your research, please.

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1 A. Sure. The National Cancer Institute is
2 probably the number one sponsor of the grants that I
3 have had. Centers for Disease Control is another
4 sponsor. Robert Wood Johnson Foundation, which is a
5 private foundation in New Jersey, has funded quite a bit
6 of my work.

7 The Association of Teachers of Preventive
8 Medicine have funded my work. I've gotten some money --
9 one time I got money from a drug company to do a study
10 of a smoking cessation drug. Those have been the main
11 sponsors.

12 Q. Okay. Just a couple of sentences on the
13 Robert Wood Johnson Foundation, please. What is that?

14 A. Well, it's a philanthropic foundation that
15 is primarily interested in health issues, mainly health
16 issues related to health care, provision of health care
17 to all segments of the population.

18 They have a major initiative that they
19 started about ten years ago on substance abuse, of which
20 tobacco is a part, which is why I got involved in
21 applying to them for funding.

22 Q. Is the Robert Wood Johnson Foundation
23 affiliated in any way with some company whose name we
24 would recognize?

25 A. Yes.

26 Q. What?

27 A. Johnson and Johnson; band-aids, they make
28 drugs, they are a pharmaceutical company as well.

2479

1 Q. Now, over the last five years or so have
2 you been doing some research sponsored -- into tobacco
3 sponsored by a branch of the U.S. government?

4 A. Yes.
5 Q. First of all, which branch, please?
6 A. The National Cancer Institute.
7 Q. Is that a government body?
8 A. Yes, it is.
9 Q. What research, please?
10 A. I have had a number of grants over the
11 years, but the last two grants that I've had have dealt
12 with analyzing internal tobacco industry documents.

13 Q. How much money has the National Cancer
14 Institute given you, not only in person, of course, in
15 order to analyze internal tobacco company documents
16 starting in the last four or five years, please?

17 A. Right. I'm the principal investigator of
18 those grants, which means I direct them, but the grants
19 actually go to Roswell Park Cancer Institute. So they
20 are made to our organization, but it totals over
21 \$1 million.

22 Q. When were the grants given?

23 A. The first grant that I received was in --
24 of the tobacco document group was in 1997; and the other
25 one, I believe, was in 2000.

26 Q. Before we get into documents, just step
27 back a bit.

28 Is Roswell Park affiliated with some

2480

1 university?

2 A. Yes, it is.

3 Q. What?

4 A. The State University of New York at
5 Buffalo.

6 Q. Were the National Cancer Institute grants
7 to look into internal tobacco company documents focused
8 in any given direction, please?

9 A. Yes, they were.

10 Q. What direction?

11 A. The first grant that I received was
12 focused on marketing practices of the tobacco companies,
13 particularly as they were aimed at youth.

14 Q. When did you start looking at tobacco
15 company documents in regard to marketing to youth?

16 A. Well, I had actually served as an expert
17 witness in the Medicaid cases, a few of the Medicaid
18 cases.

19 MR. BLEAKLEY: Objection, your Honor. It's
20 non-responsive.

21 THE COURT: The objection is sustained. The
22 objection will be stricken. The question is: When did
23 you start looking at tobacco company documents with
24 regard to marketing to youth?

25 THE WITNESS: 1995.

26 THE COURT: Thank you.

27 MR. PIUZE: Thank you.

28 Q. Now, when did you start looking at these

2481

1 same documents under the grant from the National Cancer
2 Institute?

3 A. 1997.

4 Q. So before you got this grant, you already
5 had a head start?

6 A. A bit.

7 Q. Was there another area covered by a later
8 grant for you to look into as far as tobacco company

9 documents are concerned?
10 A. Yes.
11 Q. What area?
12 A. The second grant was focused on looking at
13 documents from The Tobacco Institute and the Council for
14 Tobacco Research.

15 Q. When did you get that -- and again, this
16 isn't the you personally at your house -- but when did
17 that grant come in, please?

18 A. That grant started up in 2000.

19 Q. Why -- let's take that one first.

20 Why in 2000 was the National Cancer
21 Institute looking at or wanting you to look at internal
22 tobacco company documents having to do with tobacco
23 umbrella -- company umbrella groups?

24 MR. BLEAKLEY: Objection.

25 THE COURT: Sustained. Calls for hearsay.

26 Calls for speculation and no foundation.

27 BY MR. PIUZE:

28 Q. Well, were you given -- as part of this

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1 grant, were there parameters about what was to be done
2 and what wasn't to be done and what the purposes were
3 and things like that?

4 A. Yes.

5 Q. Let's put it this way: What was the scope
6 of your investigation? What was the U.S. government
7 giving you money to look at?

8 THE COURT: Those are two separate questions.
9 As to the second one, it calls for hearsay. As to the
10 first one, he can answer his understanding of the
11 scope.

12 The other -- if you want to go into the
13 second one, the best evidence will be the document
14 itself. If you have that, we would be glad to deal with
15 it.

16 THE WITNESS: Well, the --

17 THE COURT: There is no question pending.

18 THE WITNESS: I'm sorry.

19 THE COURT: Form a question.

20 BY MR. PIUZE:

21 Q. What was the scope of your investigation
22 into the internal tobacco company documents having to do
23 with their umbrella organizations?

24 A. The scope was basically to, one, obtain
25 The Tobacco Institute and Council for Tobacco Research
26 documents, collect them, in other words, to index them
27 in a way that could be searched for research purposes;
28 abstract them, because many of these documents are quite

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1 long, so we were basically creating like a card
2 catalogue of those documents; and we were going to make
3 those publicly available.

4 That was one of the intents was to
5 collect, index, abstract, and place up on the internet
6 this group of documents.

7 Secondly, was to analyze these documents
8 in relationship to the stated mission for the various
9 organizations that we were researching, The Tobacco
10 Institute and the Council for Tobacco Research.

11 Q. I don't want any conclusions at this time,
12 but what do you mean "analyze"?

13 A. Well, we would read the documents and

14 basically draw our conclusions based on the analysis of
15 the documents plus -- nothing is ever done in a vacuum.
16 You would look at research that had been published
17 beforehand on the industry, and I had actually done my
18 own research on the Council for Tobacco Research
19 earlier.

20 Q. Again, without content, why had you done
21 your research before this grant came in?

22 A. Basically -- on the Council for Tobacco
23 Research?

24 Q. Yes, sir.

25 A. Okay. Because there was a question that
26 had come up when I was working on the Surgeon General's
27 report in 1989 as to whether the Council for Tobacco
28 Research was a legitimate research organization funding

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1 research into the tobacco and health issue, and so I
2 undertook a study to test that hypothesis.

3 I had my own preconceived notions of that
4 hypothesis because I knew people who were recipients of
5 grants from the Council for Tobacco Research and knew of
6 the type of research that they were doing.

7 MR. BLEAKLEY: Your Honor, I am going to move to
8 strike the latter part of that answer as non-responsive
9 about his pre-conceptions.

10 THE COURT: The objection is sustained. The
11 portion of the answer that begins with "I had my own
12 preconceived notions" is stricken and the jury is
13 instructed to disregard it.

14 BY MR. PIUZE:

15 Q. As of 1989 when you were involved in that
16 Surgeon General's report, was your research institution
17 a recipient of CTR funds?

18 A. Yes, it was.

19 Q. How long had your research institution
20 been a recipient of CTR funds?

21 A. Decades. Not many of the investigators at
22 Roswell Park got CTR funds, but over the -- over a
23 30-year period, scientists at our institution had been
24 supported through CTR.

25 Q. Here is a softball for you, but I assume
26 you figure the scientists at your institution are pretty
27 good cancer scientists?

28 A. There are. Excellent.

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1 Q. Okay. Now, when is the last time that
2 Roswell Park had money from the CTR?

3 A. That's a good question. In the mid-1990s,
4 a policy was enacted --

5 MR. BLEAKLEY: Objection. It's non-responsive.

6 THE COURT: Sustained.

7 THE WITNESS: Mid-1990s.

8 BY MR. PIUZE:

9 Q. Mid-1990s?

10 A. Have not had any more grants.

11 Q. Did you play a role in the outcome that
12 Roswell Park has not had any grants from the Council for
13 Tobacco Research for about the last seven years or so?

14 A. Yes.

15 MR. BLEAKLEY: Objection. Relevance.

16 THE WITNESS: Sorry.

17 THE COURT: Well, let's get an answer yes or no,
18 and then we will see where the next question goes.

19 The answer is "yes"?

20 THE WITNESS: The answer was "yes."

21 THE COURT: Thank you.

22 BY MR. PIUZE:

23 Q. Then the next question is: What role did

24 you play in the fact that Roswell Park no longer has CTR

25 money?

26 THE COURT: The question calls for a narrative

27 answer and it is just -- it is so broad that there is no

28 way that counsel can appropriately object if an

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1 objection is called for.

2 See if you can frame another question.

3 BY MR. PIUZE:

4 Q. Did Roswell Park -- was -- did the CTR

5 stop giving or did Roswell Park stop taking it?

6 A. Roswell Park stopped taking it.

7 Q. Why?

8 MR. BLEAKLEY: Objection. Relevance.

9 THE COURT: Sustained.

10 BY MR. PIUZE:

11 Q. I'd like to -- before we go to the first

12 of those two studies, which is marketing as it involved

13 youth, talk about what you do up at Roswell Park on a

14 regular basis. Okay?

15 A. Fine.

16 Q. What do you do besides research?

17 A. Well, I teach. That's one of my main

18 responsibilities. I teach two courses a year. I

19 provide education to smokers. I run a stop smoking

20 clinic and have been doing that for the last 20 years.

21 Every month I run a clinic.

22 I direct the New York State Smokers Quit

23 Line, which is a service that people can call to get

24 information on how to quit smoking, and so I direct that

25 activity. We have probably ten, you know, information

specialists that handle those calls. I train those

information specialists.

28 I have developed over the years education

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1 campaigns on various cancer prevention topics, including

2 tobacco, that have been run in the community. I serve

3 as a spokesperson for the institute on issues related to

4 prevention, particularly relating to tobacco.

5 I provide testimony and have provided

6 testimony to government officials on issues related to

7 cancer prevention and control. Much of it, again, deals

8 with tobacco because of my expertise and interest in

9 that area.

10 So those are -- those will give you

11 some -- I oversee a staff of 60 people who work for me,

12 most of whom are on grants. I write a lot of grants.

13 Q. Let's stay with the smoking cessation.

14 Will you talk about that a little bit?

15 A. Sure.

16 Q. How many people have been involved over

17 the years? I mean people who want to stop, not the

18 people who work for you trying to get them to stop. How

19 many people have been involved with Roswell Park over

20 the years that you have been there involved with the

smoking cessation program, trying to stop?

22 A. How many people have come to our clinics?

23 Q. Well, let's do that question.

24 A. Sure. We probably are the largest clinic
25 operation in western New York, have treated -- and I
26 have run virtually all the clinics myself -- probably
27 seen 10,000 people through our programs, so these are
28 people who volunteer to come to a cancer center to stop

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1 smoking.

2 We sometimes take that program on the
3 road, go to community education programs. I have run
4 them at schools. I have run them at work sites. I have
5 run them in prisons. I have run them in basically drug
6 rehab centers.

7 So that's -- that's the clinic; and, you
8 know, we have a -- basically a formula that we run
9 people through. It runs over a three-week period, and
10 people voluntarily come to that. They pay a small
11 amount of money which pays for the materials that we
12 purchase for the program.

13 Q. How do you round up the people? Is it
14 that you are just sitting there waiting for them to come
15 knocking on your door, or do you go out looking for
16 them?

17 A. Well, we have done both. Mostly I say
18 people can find out about us because, you know, we are a
19 comprehensive cancer center and they ought to know
20 something about tobacco cessation. We run the program,
21 but it's hearsay, word of mouth. Most people know of
22 our program through word of mouth. We have many people
23 that come to our program over and over again.

24 Q. Don't say "hearsay."
25 (Laughter.)

26 Q. Now, the type of people that come to your
27 program, if I gave you a choice between heavy smokers,
28 light smokers, all kinds of smokers, what's the right

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1 explanation, please?

2 A. Mostly heavy smokers. People we see in
3 our program typically are a little older. We don't get
4 too many young people, although I have had some
5 teenagers in the program often dragged by mom or dad;
6 but mostly of the age of 40. Most of the people have
7 had substantial experience in trying to quit smoking
8 before unsuccessfully.

9 So many have experience with using a
10 variety of other stop-smoking methods. We spend a lot
11 of time talking about some of the methodologies for
12 quitting, because today I would suggest that about
13 60 percent of the people coming to our program are using
14 some form of what we call pharmaco therapy; nicotine
15 replacement therapy like patches or gum. There's an
16 inhaler. There is also a drug called Zyban, which is
17 now being marketed for smoking cessation.

18 We don't prescribe those at our clinic,
19 but many of the people have those drugs or are getting
20 them when they come to our program.

21 THE COURT: The answer is a little bit beyond
22 the question. You have answered the question.

23 May we have another question, please.

24 MR. PIUZE: Okay.

25 Q. Most of the people that come to your
26 program have already tried these kinds of things and are
27 still smoking?

28 A. That's right.

1 Q. When did the nicotine gum first arrive,
2 please?

3 A. 1982.

4 Q. Did a scientist at Roswell Park play a
5 role in the development of the nicotine gum?

6 A. Not at Roswell Park.

7 Q. Where, please?

8 A. University of Buffalo.

9 Q. Okay. Is that someone who's affiliated
10 with your place at all or no?

11 A. No.

12 Q. When nicotine gum first came on the
13 market, was it a prescription-only thing?

14 A. Yes. In other words, you could only get
15 it by going to the doctor and have him write a
16 prescription for it.

17 Q. When did that change?

18 A. Mid-1990s, around 1996.

19 Q. When did nicotine patches come on the
20 market, please?

21 A. 1980 or 1992.

22 Q. When nicotine patches came on the market,
23 were they prescription only?

24 A. Yes.

25 Q. Is that still the case?

26 A. No. It's not the case anymore.

27 Q. When did that change?

28 A. 1996, I believe.

1 Q. So both gum and patches became
2 over-the-counter in the mid-Nineties?

3 A. That's right.

4 Q. When did nicotine inhalers come on the
5 market, please?

6 A. I believe the inhaler was introduced
7 around 1994 or 1995.

8 Q. What is that?

9 A. It's a -- it's basically a plastic tube.

10 It looks like a cigarette or like a cigarette. It's
11 plastic, and you put a little capsule that has some
12 liquid in it, push together the two ends, and basically
13 you're getting a little mist of nicotine that is
14 predominately absorbed in the mouth.

15 It really doesn't get into your lungs.

16 Most of it is absorbed in the mouth; and it's just
17 another way of getting, you know, nicotine into somebody
18 who's trying to quit smoking.

19 Q. Prescription only?

20 A. That is prescription only.

21 Q. Okay. Now, the people that come to your
22 clinic who are heavy smokers, do some of them stop
23 smoking?

24 A. Yes, they do.

25 Q. Do all of them stop smoking for a while?

26 A. Almost all will quit. There's always a
27 few holdouts who will not give up cigarettes at all; but
28 almost all quit during the clinic, but many end up going

1 back to smoking, unfortunately.

2 Q. That's where I was going with the next
3 series of questions.

4 Let's put aside the few who don't even

5 try. Of the heavy smokers that come to your clinic and
6 put down the cigarettes, how many at the end of a week
7 have gone back to smoking?

8 A. About 40 percent at the end of a week. We
9 have our class, which I can explain. I don't know if
10 you want me to. I won't.

11 (Laughter.)

12 THE COURT: We may get to that.

13 THE WITNESS: Sure.

14 BY MR. PIUZE:

15 Q. How often is the class, Dr. Cummings?

16 A. We run the class once a week for three
17 weeks, and so there's a pattern to how we do it.

18 Q. Well, start with the pattern. What's the
19 pattern of how you do it?

20 A. Well, the first night basically is why do
21 you want to be there? Why do you want to stop?

22 We try to get some idea of who we have
23 there, find out something about their smoking history.
24 We actually have them keep a record of their smoking
25 behavior over a one-week period. So we get to learn
26 when and where they do a lot of their smoking, and we
27 give them some advice on making some changes before they
28 have to quit.

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1 The second session we ask them to throw
2 their cigarettes out. They actually have them sign a
3 contract that they are not going to smoke. They put in
4 \$10 for that contract, it's a pledge; and they get their
5 \$10 back a month later if they haven't gone back to
6 smoking; and if they have gone back to smoking, the
7 money is actually divided up and given to those who quit
8 and stay off.

9 The third session we basically have people
10 who have had a week without smoking; and this is why I
11 know what's happening in terms of the people returning
12 back to smoking; and we basically go over what it's been
13 like. The people that have fallen off the wagon, if
14 they come back, we try to boost them up and get them to
15 try to quit again.

16 The people that have stayed off of
17 cigarettes, you know, we can graduate them obviously. A
18 lot of them have had a tough time talking about how to
19 alleviate some of the withdrawal; but basically, it's
20 focusing on positives, not dwelling on negatives.

21 Q. Do you, over the course of years, follow
22 up beyond the three-week period, beyond the third week,
23 to figure out exactly how successful your programs are?

24 A. Yeah. We follow up in a month because
25 people want to know about their \$10.

26 (Laughter.)

27 A. It's also a way to check up on people; and
28 again, a lot of people will relapse. So we find it is

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1 an opportunity to try to get them to recycle again, to
2 quit again. So those people come back to our clinics;
3 and over the years, we have followed out to a year.

4 Q. So here's what I want -- well, before I go
5 to the ultimates: Is the Roswell Park Smoking Cessation
6 Clinic that you are the boss of, is that a pretty good
7 one?

8 A. I think it's a pretty good one. It's
9 pretty standard.

10 Q. You got all the best techniques, most
11 modern techniques?
12 A. I try to stay current on the available
13 techniques for quitting smoking, because we got people
14 who come in with a lot of methods they have heard about,
15 so I can steer them in the right direction what there is
16 really medical evidence to support.

17 Q. What's your, not after one week, after one
18 week you have a 60 percent success rate; but what about
19 after -- I am going to give you a couple of markers -- a
20 month, a year, anyplace in between that you follow up
21 on, what's the success rate?

22 A. Well, as I said, you know, you have about
23 40 percent have gone back to smoking; about 60 off at a
24 week. At a month we are about 50-50. At a year we are
25 down about 30 percent, 20 to 30 percent; and this, of
26 course, is based on what people will self-report to us.

27 The rates go down a little bit lower if
28 you have them do a biochemical validation, which is

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1 something that we do during the class. We have a little
2 machine that people blow into to measure carbon monoxide
3 levels, because it's elevated when you smoke and it
4 goes back to normal when you quit relatively quickly;
5 and it's a good way for us to check who's smoking or
6 not.

7 It's also a way for people to see a real
8 benefit to quitting smoking, and we explain how carbon
9 monoxide affects their health.

10 Q. Is the bottom line, then, at the end of
11 the year, what, 20 percent of those people are still
12 off? 25? 30? What?

13 A. About 25 to 30 percent still off.

14 Q. And the remaining 70 to 80 percent of
15 these heavy smokers are again smoking?

16 A. Back puffing away, unfortunately.

17 Q. Why can't you do better?

18 A. Well, a lot of it is up to the person,
19 frankly; and I tell people that in the first clinic. I
20 said, "You've come in here. I don't have any magic
21 bullets to pull out of my pocket. There's no magic drug
22 that's going to make you stop smoking. I haven't found
23 it. I certainly have been looking, but I haven't found
24 it."

25 So it really comes down to three things:
26 A person has to want to do it. They have to be willing
27 to make changes in their routine around smoking. It's a
28 very over-learned behavior. People do it a lot and it

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1 gets a repetition and they have certain cues that
2 trigger that behavior; and third, you have to tough it
3 out and get through the withdrawal that accompanies
4 quitting, particularly among a heavy smoker.

5 Q. Okay. You tell that to the people?

6 A. I absolutely do, first session, that's
7 what we go over.

8 Q. And you still get the rates you told us
9 about?

10 A. That's right.

11 Q. What's an over-learned behavior?

12 A. Well, smoking is an over-learned
13 behavior. I suspect most people learn how to brush
14 their teeth. You get into certain habits. You go home

15 at night and do certain things like plop down in front
16 of the television or certain chair you sit at every
17 night, you know, for dinner or whatever.

18 So we have, you know, habits, I think, are
19 what we call over-learned behaviors.

20 Q. Before I move on to another subject now,
21 the numbers you have been talking about, the percentages
22 you have been talking about, are for people that come in
23 to your smoking cessation clinic?

24 A. That's right.

25 Q. What percentage of the heavy smokers in
26 western New York come into your smoking cessation
27 clinic?

28 A. Probably -- well, in any given year, I

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1 mean, we maybe see 1,500 people, about, every year. So
2 we are seeing a very tiny fraction of all the smokers.
3 So it's a tiny, you know, fraction. Less than 1 percent
4 in a given year will come into our program.

5 Q. Do you, based on your research and your
6 follow-ups, are these people that come into your program
7 and plop down their money and their time, do you
8 consider them to be especially motivated people as far
9 as stopping smoking is concerned?

10 A. Highly motivated. Many of the people that
11 we see -- I mean, they are coming to a cancer clinic and
12 there is a lot of fear just to come to a cancer hospital
13 to quit smoking; and so there's a -- they are a highly
14 motivated group of people, I would say.

15 Q. And the last, hopefully, question I am
16 going to ask on this line is: The 70 to 80 percent of
17 people that don't make it quitting are from the highly
18 motivated to quit population?

19 A. Yes, they are.

20 Q. Here we go to your review of the documents.
21 Where were the documents? Did you go into
22 some old warehouse someplace and start sifting through
23 documents?

24 A. I've gotten them from a variety of
25 sources. Some of the documents have been available
26 on-line, in other words, on the internet. Some of the
27 documents have been given to me over the years by
28 attorneys, and some of come out of those warehouses.

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1 The New York State Archive has been a major source of
2 documents that we have collected from The Tobacco
3 Institute and Council for Tobacco Research.

4 Q. Where are the New York State Archives?

5 A. It's located in Albany, the government,
6 basically, warehouses archives, build archives of
7 documents for the New York state government.

8 Q. And without -- without please going into
9 all of the reasons behind it, did you work under the
10 assumption that that New York State warehouse had a
11 fairly complete set of CTR and TIRC documents?

12 A. Yes.

13 Q. How many people did you have going through
14 the documents, please?

15 A. I probably had ten people working on this
16 project over the last four years, four or five years.

17 Q. How many documents have you looked
18 through, please?

19 A. I couldn't even -- tens of thousands, it

20 seems like. I take -- my wife would kill me. I take
21 documents home at night. I am reading them in bed. You
22 know, lots of documents. Obviously, we pare them down
23 into collections. That's our goal.

24 Q. How do you go about analyzing -- I don't
25 want any results now, just methods -- how do you go
26 about analyzing the documents?

27 A. Well, we've used certain search codes.
28 Once we get the documents indexed, we will use a code

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1 searching for pulling out the documents that fall within
2 certain codes.

3 Q. Such as?

4 A. Well, for the youth marketing research
5 project, we used the word "youth," "teenager." We
6 looked at certain brands and brand names that we knew
7 from our other research were popular with teenage
8 smokers.

9 As we came across documents that would
10 suggest other terms that we could use, so a little bit
11 of a snowballing technique to identify other terms for
12 searching. "First usual brand" or "first usual brand
13 young adult smoker" became a term that we used.

14 Certain marketing practices, movies,
15 sampling things of that nature that had come up in
16 research related to marketing to youth.

17 MR. PIUZE: All right. I think, your Honor, my
18 next move probably is to show a couple of documents; and
19 I am looking for guidance from the court. I am ready to
20 do it right now. I also see there's five minutes left
21 and I will do whatever the court -- there's no cue here.
22 I just want to know. . .

23 THE COURT: I appreciate your asking. This is a
24 good time to take the break. The jury will be allowed
25 to return at 9:00 tomorrow morning. I would admonish
26 them not to discuss this matter amongst themselves or
27 with anyone else, and do not form or express any opinion
28 on the matter until it is finally submitted.

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1 As soon as the jurors have left the
2 courtroom, we will stay on the record and you will make
3 your offer of proof on the record, and I will hear
4 whatever objections there may be.

5 MR. PIUZE: Thank you.

6 THE COURT: You're welcome.

7
8 (The following proceedings were held
9 in open court outside the presence
10 of the jury:)

11
12 THE COURT: The record will reflect the jurors
13 have left the courtroom, and this would be a good time
14 for an offer of proof as to where we are going with this
15 witness as far as the documents are concerned. I
16 thought that's what you said at the end of the session.

17 MR. PIUZE: Well, as far as the documents are
18 concerned, at this point I would simply ask him to
19 identify certain documents which are not in contest; in
20 other words, I don't believe that there will be an
21 objection to them coming into evidence.

22 THE COURT: Okay.

23 MR. PIUZE: And I am going to start off by
24 asking him to identify those documents. Now, is that

25 what you would like me to do?
26 THE COURT: Sure.
27 MR. PIUZE: Okay.
28 THE COURT: So he is going to identify certain
1 documents that he has read. That's the easy part. And
2 then what happens with the documents?
3 MR. PIUZE: Well, then I'm going to show him
4 something called the "Cigarette Advertising Code" and
5 ask him to explain what it is. And why don't I do that
6 first, your Honor?
7 THE COURT: Well, do you have any objection to
8 that?
9 MR. LEITER: We don't have objections to most of
10 the admissibility of the documents and we wouldn't have
11 an objection to the admissibility of the Cigarette
12 Advertising Code.
13 THE COURT: Okay.
14 MR. LEITER: So --
15 THE COURT: My question is: Do you have an
16 objection to the witness testifying to what it is,
17 especially if it's coming into evidence? Don't these
18 documents speak for itself?
19 MR. LEITER: The documents speaks for itself,
20 your Honor.
21 THE COURT: So what's he going to tell us?
22 MR. PIUZE: Well, he's going to tell us about --
23 based on his background, understanding -- excuse me --
24 background, research, and knowledge why that came to be
25 in the first place.
26 THE COURT: Well, we better have a 402 hearing
27 on that right now. Let's do it.
28 MR. PIUZE: Why did that come to be in the first
1 place?
2 THE COURT: No. How do you know why that came
3 to be in existence, is the first question.
4 THE WITNESS: The cigarette advertising code has
5 been talked about frequently by the tobacco companies.
6 I mean, they have talked about having their voluntary ad
7 code.
8 THE COURT: My question is: How do you know how
9 that came about? Were you at a meeting when somebody
10 spoke about it? Did somebody call you up on the phone?
11 How do you know?
12 THE WITNESS: How do I know that this -- how it
13 came about, their voluntary code? I mean, it's
14 described in their own internal documents.
15 THE COURT: What documents? Show me the
16 documents that tell what it is you are going to say you
17 you know. The best evidence is the document.
18 THE WITNESS: Right. Well, there are a variety
19 of letters, but I didn't bring those with me.
20 THE COURT: Then you are not going to be able to
21 introduce them and you are not going to be able to talk
22 about them. The best evidence rule requires that the
23 other side gets to see that upon which you base your
24 opinion.
25 Anything else?
26 MR. PIUZE: Well, sure, there's lots else.
27 THE COURT: Try another one.
28 MR. PIUZE: When you say you didn't bring them,

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1 where are they, in the hotel?
2 THE WITNESS: Yes.
3 MR. PIUZE: The hotel.
4 THE COURT: Bring them in tomorrow.
5 THE WITNESS: Okay.
6 MR. PIUZE: I will bring them tomorrow.
7 THE COURT: What else?
8 MR. PIUZE: What else. When I --
9 THE COURT: No, I interrupted him. He was
10 telling me the basis of how he knows what this document
11 is. The witness has answered partly on the basis of
12 certain letters.

13 You have established that he has those in
14 the hotel and he will bring them or he will furnish them
15 to the other side so that they can look at them over the
16 night.

17 What other things lead you to know why
18 that document was created, or have you told us all of
19 it?

20 THE WITNESS: Well, I know it was created
21 because the cigarette companies have stated they had a
22 voluntary code. They have had advertisements that have
23 talked about their voluntary code.

24 THE COURT: Do you have the advertisements with
25 you that you will bring us tomorrow?

26 THE WITNESS: Yeah.

27 THE COURT: Okay. That's fine. You are going
28 to show us the letters. You are going to shows us the

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1 advertisements.

2 Is there any other basis that you have to
3 answer Mr. Piuze's question of why that document was
4 created?

5 THE WITNESS: No.

6 THE COURT: Okay. That is certainly admissible
7 stuff. If he brings those documents and you fellows
8 have a chance to see it in advance, that sounds
9 perfectly okay to me.

10 MR. PIUZE: To continue.

11 THE COURT: Go a right ahead.

12 MR. PIUZE: Okay.

13 After establishing what this document
14 says -- and so we are not being too cryptic, this is the
15 cigarette advertising code, Exhibit 546.00 -- I would
16 then show this witness a series of either Philip Morris
17 or CTR, TIRC -- TIRC begot CTR -- documents or documents
18 to Philip Morris from Philip Morris' agents; and they
19 all deal with youth smoking, tracking youth habits, and
20 he will identify those things.

21 THE COURT: Tell us how he found them or how it
22 came into his possession.

23 THE WITNESS: Sure.

24 THE COURT: You don't have to do it now. That's
25 fine.

26 MR. PIUZE: Okay. And to those documents, I
27 again believe there probably will be no objection.

28 Then I would ask him --

2505

1 THE COURT: Let's find out.

2 Are there going to be any objection to
3 those, assuming you have seen them all?

4 MR. LEITER: Assuming we have seen them all,
5 there wouldn't be authenticity objections, but it's not

6 clear to us what relevance they have to this case, this
7 plaintiff.

8 THE COURT: Well, okay. That is a good question
9 and you are entitled to an answer, and why don't you
10 tell them.

11 MR. PIUZE: The answer is that I believe this
12 was subject to a motion in limine, which they lost,
13 which is no youth smoking issues in this case; and
14 because Ms. Bullock started as a youth, it is an issue
15 in this case; and because this is a product liability
16 case and especially one involving a claim for punitive
17 damages, we get to put on other similar events.

18 THE COURT: Okay.

19 MR. PIUZE: And because this is a fraud case and
20 part of the fraud is that we claim they are out trying
21 to suck in kids to start smoking this stuff so that they
22 are addicted before they become adults, that's a part of
23 the case. So that's why it's a part of the case.

24 THE COURT: And part of that was in your opening
25 statement to the jury.

26 MR. PIUZE: Oh, yes.

27 MR. LEITER: And just to be clear as to what our
28 position is, your Honor, the fraud allegation is that we

2506

1 allegedly defrauded Mrs. Bullock. This is not a
2 referendum on Philip Morris' alleged conduct for the
3 last 40 years. We start with this plaintiff.

4 This plaintiff turned 18 in 1956. If the
5 plaintiff has evidence of youth targeting prior to 1956
6 and a connection is going to be made to this plaintiff,
7 let's see that evidence and let's talk about it.

8 But this is simply, I hear some alleged
9 bad conduct from later years that we would like to
10 introduce because we would like the jury to be really
11 mad at Philip Morris.

12 MR. PIUZE: Continuing course of conduct. It's
13 a continuing course of conduct to this day, and for the
14 jury to have any idea about the wickedness of the
15 conduct, they must know whether or not it's continuing.

16 THE COURT: Okay. That objection is
17 overruled.

18 Next.

19 MR. PIUZE: Okay. Then I would ask this witness
20 his opinion as to whether or not based on the documents
21 that have been uncovered -- not uncovered -- the
22 documents that I am going to show him as far as youth
23 marketing, that the promises made in this cigarette
24 advertising code were upheld.

25 THE COURT: And your objection will be?

26 MR. LEITER: It's a great closing argument, but
27 this witness, with all due respect, Dr. Cummings,
28 doesn't bring any opinion that is based on his academic

2507

1 background or scientific knowledge that is relevant to
2 the jury.

3 This witness is going to testify, we
4 believe, that he has spent and his staff has spent lots
5 of time reading tobacco company documents; and he
6 proposes, I believe, to draw conclusions based on those
7 documents and then draw conclusions as to whether they
8 are consistent or inconsistent with the cigarette
9 advertising code.

10 There's no independent expertise here.

11 THE COURT: Do you want to respond?
12 MR. PIUZE: Sure. There is background for him
13 to be talking about these things; and when I get to that
14 opinion tomorrow, I will put out what I've got, and the
15 court will either like it or not; but I chose not -- for
16 my own trial-lawyerly purposes, I chose to do it the way
17 I did it here.

18 THE COURT: Let me tell you which way I'm going.
19 MR. PIUZE: Sure.

20 THE COURT: Unless you have whatever it is that
21 you are going to put on that demonstrates that what he
22 would testify to as an opinion does not invade the
23 province of the jury and is not a subject matter that a
24 jury and an articulate lawyer can explain to them is the
25 thrust of this, then I will sustain the objection; but I
26 will obviously hear what you have to say and what your
27 evidence is.

28 MR. PIUZE: And in case I just -- just to cue me

2508

1 so I don't forget tomorrow, I would remind the court of
2 a little bit of testimony we had earlier in this trial
3 from Dr. Doll.

4 He was talking about Bradford Hill, his
5 co-investigator, and he was talking about Bradford Hill,
6 who was a medical statistician of international repute;
7 and he said Bradford Hill was neither a doctor nor a
8 statistician. That didn't stop him from being one of
9 the world's greatest medical statisticians.

10 There is no necessary degree that you
11 stamp on someone that makes them an expert in some
12 particular field.

13 THE COURT: I hope I didn't suggest that there
14 was. I'm simply saying that for a witness to look at
15 this document, which you have identified as the --

16 THE WITNESS: Advertising code.

17 THE COURT: -- advertising code, if you will --

18 MR. PIUZE: Yes, sir.

19 THE COURT: -- and compare that with documents
20 and say, "I read this sentence and it doesn't comport,"
21 that is not expert testimony, and unless you lay a
22 foundation totally different than what I have heard so
23 far, it is not coming in.

24 MR. PIUZE: Yes, sir.

25 THE COURT: Okay.

26 MR. PIUZE: The second topic would have to do
27 with the CTR -- excuse me -- TIRC, CTR promises that
28 were made.

2509

1 THE COURT: In another document?

2 MR. PIUZE: Yeah. Basically the promises were
3 made in the Frank Statement, which the court will
4 recall.

5 THE COURT: Okay.

6 MR. PIUZE: The TIRC announced, to the best of
7 my knowledge, but I think it announced to the world its
8 existence through the Frank Statement, which was
9 published -- I'm going to get this number right one day,
10 but I think it's in 443 papers in one day on -- in early
11 January of 1954, and certain promises were made.

12 And then I'm going to have -- show this
13 witness documents. Again, documents I do not believe we
14 will have any objections about.

15 THE COURT: Okay.

16 MR. PIUZE: And find out where he got them and
17 the time frame for the documents, and read some of
18 them -- read some off the Elmo or off a blowup; but
19 ultimately where it's going to go is, "Do you have an
20 opinion about whether or not these promises were
21 upheld?"

22 THE COURT: By the virtue of reading these
23 documents?

24 MR. PIUZE: Yes, sir.

25 THE COURT: I will probably make the same
26 ruling. They are not admissible.

27 MR. PIUZE: I probably foresaw that --

28 THE COURT: Okay.

2510

1 MR. PIUZE: -- as a reasonable person.

2 THE COURT: Okay.

3 MR. PIUZE: And last -- it's hard for me to keep
4 having the conversation without smiling.

5 THE COURT: You can laugh out loud.

6 (Laughter.)

7 MR. PIUZE: And last, there is a subset of the
8 second documents that deals with lawyers running the
9 tobacco industry; and I'd say, because I don't believe
10 we have had much discussion on this, there were a couple
11 of organizations, one of which, a famous one, was called
12 the Committee of Counsel.

13 One of the documents, the document that I
14 have in mind, that Judge McCoy did allow last time under
15 the crime fraud exception --

16 THE COURT: He's far nicer than I am.

17 MR. PIUZE: Excuse me?

18 THE COURT: He is far nicer than I am. Go
19 ahead.

20 MR. PIUZE: Well, he's a really nice guy, but
21 you're not --

22 THE COURT: You haven't heard the ruling.

23 MR. PIUZE: I was just quoting your court
24 reporter.

25 THE COURT: Go ahead.

26 MR. PIUZE: Anyway, that one is res judicata,
27 but it happens to be an example of a Committee of
28 Counsel Document, and the thrust is this: Dr. Cummings,

2511

1 through tracing correspondence, memoranda and other
2 documents that he has obtained through the sources that
3 he's discussed can demonstrate for the jury that much of
4 the so-called scientific research that was being done by
5 the CTR was run by lawyers, not scientists. Lawyers had
6 veto powers over it. The scientists were kept away from
7 it.

8 And this may not even require opinions.
9 As a matter of fact, in this area, I don't know that I
10 would be asking an opinion, but we would be tracing the
11 flow of paper to show how it worked.

12 THE COURT: Well, okay. Then let's deal with
13 that.

14 Clearly, the conclusions that you have
15 just stated would be admissible on your theory of
16 conspiracy and a whole series of theories that you have
17 articulated provided that -- and I have no idea what the
18 document is going to say -- that there is an appropriate
19 paper trail that is laid before counsel, they have had a
20 chance to examine it and evaluate it; and subject to the

21 best evidence rule and whatever else comes out of the
22 idea of saying this witness has gone through X, Y, and
23 Z, and he came up with this document which is a document
24 that was created by Philip Morris or by this agency,
25 whatever that is, believe me, that's all appropriate.
26 There is nothing wrong with that if it's properly
27 documented.

28 Now, the issue of relevance, I think I'm

2512

1 prepared to rule in favor of the plaintiff on the theory
2 if indeed there are lawyers who are directing research
3 that is consistent with the articulation by the
4 plaintiff's lawyer that this is part of the conspiracy
5 and a cover-up.

6 MR. LEITER: And, your Honor, my objection is
7 not on relevance grounds.

8 THE COURT: Okay.

9 MR. LEITER: We have a separate objection with
10 regard to this testimony and the other CTR-related
11 testimony.

12 THE COURT: And that will be?

13 MR. LEITER: This witness was never designated
14 to testify on any of those subjects. We were not -- we
15 did not take discovery of this witness on any of those
16 subjects for that reason.

17 THE COURT: And you may be right.

18 MR. PIUZE: And he may be wrong.

19 THE COURT: Let me finish.

20 MR. PIUZE: Right.

21 THE COURT: If all this witness is doing is
22 simply saying, "This is how I got the document to come
23 into here," then it is not of great consequence to me
24 that he was not designated as a witness.

25 It is of great consequence to me, however,
26 that you have not had a chance to examine the witness
27 out of the presence of the jury on the issue of how the
28 document came into his possession, and I agree with you.

2513

1 And the simple answer to that is, you have
2 the deposition tonight, and you furnish the documents
3 that are going to be furnished between now and 5:00
4 o'clock, and schedule the time and place where you are
5 going to have the deposition tonight. It's not
6 difficult.

7 MR. PIUZE: There is no reason or need for a
8 deposition, your Honor. Part of the expert witness --
9 again, he's challenging it. I don't have the
10 designation here. He's challenging it, so he should
11 have the designation. But I can remember for a
12 certainty that the tag line on that designation had to
13 do with this witness discussing the tobacco industry
14 fraud on us.

15 THE COURT: Okay. Again, I am not precluding
16 you for a moment from going down the path that you have
17 indicated through this witness that he's going to
18 identify documents.

19 If counsel, however, says to me, "We
20 didn't read it carefully," whatever the reason is, I
21 don't care; but that as to these documents, we chose not
22 to -- let's make it strong -- we chose not to examine
23 him on the chain of evidence as to these documents. We
24 either forgot or we didn't think about it or we didn't
25 do it, whatever the reason; but in the interest of

26 justice, we wanted before he takes the stand, to do it.
27 We are talking about a deposition on that issue that's
28 going to take, what, an hour? Two? It will be done

2514

1 tonight.

2 MR. PIUZE: You are asking me?

3 THE COURT: Well, I'm just saying it's not a big
4 deal. It will be done; and if all we have to do is take
5 the deposition, well, take the deposition. It's not a
6 big deal. Let's get it in front of the jury so that we
7 don't create error where there is no need to create
8 error.

9 And if all we are talking about is this
10 chain of command or chain and custody of evidence or
11 where it comes from or the best evidence rule, go do
12 it. So exchange the documents and schedule the
13 deposition for tonight.

14 MR. PIUZE: The last issue that I was going to
15 discuss with him --

16 THE COURT: Sure.

17 MR. PIUZE: -- question him about.

18 THE COURT: This witness?

19 MR. PIUZE: Yes, sir.

20 THE COURT: Yes, indeed.

21 MR. PIUZE: I keep saying discuss and it's
22 really question.

23 -- has to do with --

24 THE COURT: Maybe yes, maybe no. Go ahead.

25 MR. PIUZE: It's my low-impact questioning.

26 -- has to do with his analysis of what the
27 CTR money was spent on and whether or not it was really
28 spent on tobacco-related research.

2515

1 THE COURT: Okay. And you said that in
2 chambers?

3 MR. PIUZE: I did.

4 THE COURT: So the issues are, again, we are
5 back to the best evidence rule and the chain of
6 custody. They have a right to see the documents that he
7 looked at in order to reach whatever conclusion he
8 reached.

9 They have an opportunity -- they have a
10 right to inquire, and that can certainly be the subject
11 matter of the deposition: "How did you reach that
12 conclusion? And how many documents did you look at?"

13 "Well, I looked at ten documents" or "I
14 look at 10,000 documents."

15 "How many documents were there?"

16 "Well, there were 10 million documents."

17 "Did you look at any of the other ones?"

18 "No, I took a sample" or "No, I didn't do
19 it. I had ten other people do it."

20 I don't know what it's going to be; but if
21 this witness is going to testify as to percentages based
22 upon something, then we need to have both a paper trail,
23 we need to have the best evidence, and they have to have
24 the opportunity of being able to cross-examine.

25 Otherwise it's like the story I told you long ago about
26 the guy who shoots -- in Guys and Dolls who shoots dice
27 in his derby, and you know that story. Or you don't
28 know that story?

2516

1 In the oldest established crap game in

2 New York, they are sitting around playing dice, and Big
3 Louie comes in, and there's a dice game, and he takes
4 all the money and he says, "I'm making this bet."
5

6 And he takes the dice, takes off his derby
7 hat, and rolls the dice in his hat; and he says, "My
8 point is eight." He rolls them again and he says, "I
made my point" and takes all the money.

9 And one little guy who just had been
10 totally cleaned out says, "Tell me, sir, did you make it
11 the hard way?"

12 (Laughter.)

13 THE COURT: Well, that's the position they are
14 in. If he says, "Well, I looked at a bunch of
15 documents, I did all the addition, and here's the
16 answer." And they want to know, "Did you make it the
17 hard way? How did you do it? Where are the document?"

18 Now, if you've got all that stuff, it
19 shouldn't be a problem.

20 MR. PIUZE: Inquiring minds want to know.

21 MR. LEITER: And if I may, your Honor, on the
22 Guys and Dolls point, that's very different from the one
23 we talked about before where there are chain of custody
24 issues and we want to know what documents.

25 THE COURT: I understand.

26 MR. LEITER: This is something that it would be
27 very unfair to require us to try to sort out between
28 tonight and tomorrow morning when this witness takes the

2517

1 stand on that subject.

2 THE COURT: It depends. It would be or it
3 wouldn't be. I don't know what he has, and that's not
4 fair for me to say. He may very well say, "I have 80
5 documents and it is published jointly by Philip Morris
6 and The Tobacco Institute, signed by the president of
7 each and it gives all these numbers."

8 Hey, that's pretty good. He doesn't need
9 a million documents. He's got one. So I don't know
10 what we are talking about. That's the problem. You all
11 know the case and I don't.

12 MR. LEITER: Okay.

13 THE COURT: So I will deal with it when I find
14 out what it is after you have looked at it; and if your
15 objection is there is no chain of custody, we have no
16 idea what we are doing, then it isn't coming in.

17 MR. LEITER: Okay.

18 MR. PIUZE: Can I confer with the witness here?

19 THE COURT: Absolutely.

20 MR. LEITER: As --

21 THE COURT: You can't do that because he's got
22 to listen.

23 MR. LEITER: I'm sorry.

24 (A pause in the proceedings.)

25 MR. PIUZE: Thank you. I left something out.

26 THE COURT: Okay.

27 MR. PIUZE: And this I will say in advance.

28 Well, I won't say anything in advance.

2518

1 Nicorette, the Nicorette nicotine issues
2 that we discussed in chambers earlier in the trial when
3 Dr. Benowitz was here, I showed the court certain
4 documents having to do with Philip Morris' campaign to
5 dissuade a major pharmaceutical company from marketing
6 its nicotine -- alternative nicotine devices

7 aggressively.

8 And at that time the court ruled the stuff
9 is going to be admissible, but as far as doing anything
10 with Dr. Benowitz, no. Anyway, this would be a witness
11 to do it with.

12 THE COURT: To do what with?

13 MR. PIUZE: Well, to introduce the documents in
14 front of the jury.

15 THE COURT: Has this witness seen the documents?

16 MR. PIUZE: Oh, sure.

17 THE COURT: Then it doesn't sound like it's
18 going to be difficult to do. If he says, "I show you
19 this document. Have you ever seen it before?"

20 "Yes, I have."

21 And we've all stipulated to where it comes
22 from -- but that's something you need to get together,
23 you need to share.

24 Now, that leads me to a really interesting
25 question because you are going to be working on your
26 depositions tonight. How early do you want to meet here
27 tomorrow morning to thrash out any of those things
28 before the jury comes in? And you all know my schedule,

2519

1 so I am at your disposal whenever you tell me to be
2 here.

3 MR. LEITER: 8:00 o'clock?

4 MR. PIUZE: I can easily be here at 8:00.

5 THE COURT: Bring your coffee with you.

6 MR. PIUZE: Sure. I just alert the court and
7 remind the defense that the Merryman transcript is still
8 out there, which I still want to finish; and if you guys
9 want to take a look at it, I designate tonight would be
10 a good idea.

11 And then I would alert the court and
12 remind counsel again that as far as Ms. Bullock's
13 deposition is concerned, they have, at my request,
14 provided me with objections to the direct, which is a
15 day's worth of playing.

16 I'll say again on the record what I said
17 off. I believe 75 to 80 percent of this stuff can be
18 resolved without the court.

19 THE COURT: I'm sure.

20 MR. PIUZE: But the court is going to have to
21 take a look at some of it and make some calls.

22 Hopefully, I will have had all of this
23 videotape transferred to a disk so that we can
24 electronically show this thing once the court has
25 decided what comes out. But that's something else we
26 got to do.

27 MR. LEITER: Is that -- I'm sorry.

28 Are you planning to go to Mrs. Bullock's

2520

1 deposition after Dr. Cummings?

2 MR. PIUZE: Well, that was going to be the next
3 thing. Per our discussions, Dr. Goldberg was going to
4 head back to Toronto. We were going to do Ms. Bullock's
5 deposition in an uninterrupted fashion. The court
6 reporter is going to go home.

7 THE COURT: Yes. I am going to let
8 Ms. McArthur go.

9 MR. LEITER: Can I put one thing on the record
10 before we go off the record?

11 THE COURT: Of course.

12 MR. LEITER: And that is, to the extent that
13 Dr. Cummings's testimony is going to include any
14 testimony or documents about post-1969 advertising or
15 youth targeting, we would like to have our continuing
16 objection on grounds of preemption under the Federal
17 Cigarette Labeling Act so that we need not object to
18 each question.

19 THE COURT: You need not object to each
20 question. You may have a running objection.

21 MR. LEITER: Thank you, your Honor.

22 MR. PIUZE: And he's not my advertising witness,
23 so I'm keeping him away from advertising.

24 THE COURT: I expect you will.

25 MR. PIUZE: Fine.

26 MR. LEITER: A couple of things, they don't need
27 to be on the record.

28 THE COURT: Okay.

2521

1 MR. PIUZE: We are done.
2
3 (A discussion was held between the
4 court and counsel, not reported.)
5
6 (The matter was continued to Thursday,
7 September 5, 2002 at 9:00 a.m. for further
8 proceedings.)
9 * * *